No. 293

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

236259—52——1

CITATIONS

Cases:

Cases—Continued

Statutes: Page

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 13) is reported at 99 F. Supp. 155. The opinion of the United States Court of Appeals for the Third Circuit (R. 46) is reported at 196 F. 2d 264.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1952 (R. 56). By order of Mr. Justice Clark, dated July 22, 1952, the time for filing a petition for a writ of certiorari was extended to and including August 26, 1952 (R.

58). The petition for a writ of certiorari was filed on August 26, 1952, and was granted on October 27, 1952 (R. 59). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the limitations provisions of Section 6 of the Portal-to-Portal Act of 1947 are applicable to suits brought by the United States to collect liquidated damages for the knowing employment of minors in violation of the Walsh-Healey Public Contracts Act.

2. If Section 6 is applicable, whether a cause of action based on an administrative determination that liquidated damages are due the United States for violation of the Walsh-Healey Act accrues at the time of violation or at the date of the administrative determination upon which suit is brought.

3. If the cause of action accrues, and the period of limitation begins to run, at the time of violation of the Walsh-Healey Act, whether the issuance of the administrative complaint contemplated by the Walsh-Healey Act is the commencement of an action for the purposes of Section 6 of the Portal-to-Portal Act.

STATUTE INVOLVED

Section 6 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 87, 29 U. S. C., Supp. V, 255, read as follows:

STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

The text of the Portal-to-Portal Act and the pertinent sections of the Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, as amended, 41 U. S. C. 35–45, are set forth in Appendix A, *infra,* pp. 72–92.

STATEMENT

This is an action to recover liquidated damages in the sum of $15,600, which were administratively determined to be due the United States because of petitioner's knowing employment of child labor in violation of the Walsh-Healey Public Contracts Act. The district court held the action barred by the two-year limitations provision of Section 6 of the Portal-to-Portal Act, *supra,* p. 3. (R. 17). On appeal, the judgment of the district court was reversed and the case remanded for further proceedings (R. 56). For present purposes, the facts are uncontroverted and may be summarized as follows:

On April 17, 1947, the Secretary of Labor issued a complaint pursuant to Section 5 of the Walsh-Healey Act, charging petitioner with having knowingly employed child labor during the years 1942–1945 in violation of the Act (R. 3). On April 22, 1947, administrative proceedings on the complaint were instituted (R. 23). On February 25, 1949, after completion of the hearings, the Hearing Examiner issued a decision in which he found that petitioner had knowingly

employed child labor for a total of 1,560 working days between November 3, 1942, and November 11, 1945, and was, therefore, indebted to the United States in the sum of $15,600 as liquidated damages (R. 29–30, 36–38, 43). Upon the failure of petitioner to file a petition for review with the Chief Hearing Examiner within the twenty-day period prescribed by the Rules of Practice of the Department of Labor, the decision of the Hearing Examiner ~~become~~ became final (R. 3–4).

On January 27, 1950, the Attorney General instituted this action in the United States District Court for the District of New Jersey, on the findings and decision of the Hearing Examiner (R. 1). After the filing of an answer, both parties moved for summary judgment on the pleadings and the record of the administrative proceedings conducted by the Department of Labor (R. 5, 7–12). In pertinent part, the answer alleged as a defense that the alleged wrongful employment of minors occurred more than two years prior to the commencement of suit, citing Section 6 of the Portal-to-Portal Act (R. 6).

The district court granted petitioner's motion for summary judgment and dismissed the complaint (R. 17), holding that the limitations provision in Section 6 was applicable and that it began to run from the dates of alleged violation (R. 14–16). The court of appeals reversed, hold-

ing that "actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act" (R. 56).

SUMMARY OF ARGUMENT

I

The language of Section 6 of the Portal-to-Portal Act (*supra*, p. 3) does not expressly and unequivocally refer to the United States, nor does its legislative history reveal an intention to apply the statute to the United States. In view of the principle that a statute imposing restrictions, *viz.*, a statute of limitations, does not apply to the Government unless the intention to make it apply is clearly manifested, Section 6 should not be construed to limit suits brought by the United States to enforce the provisions of the Walsh-Healey Act. This principle is particularly appropriate where, as here, the application of the limitations period to the United States would substantially vitiate the power of the United States to enforce the remedial provisions of the Walsh-Healey Act, as is its obligation.

A. The terms and structure of the Portal-to-Portal Act refute the imputation to Congress of the intention to apply Section 6 to suits by the United States.

1. With respect to the violations of the child labor provisions of the Walsh-Healey Act, the in-

tention of Congress, as manifested by the terms and structure of the Portal-to-Portal Act, is completely unequivocal. The findings of Section 1 (a), detailing the reasons Congress deemed it necessary to enact the Act, are plainly inconsistent with any intention to legislate with respect to the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Examination of the provisions of the Portal-to-Portal Act indicates further that the term "liquidated damages" in Section 6 does not comprehend suits by the Government. And other sections bear out the conclusion that Section 6 was aimed only at employee suits and not at suits by the United States to enforce the child labor provisions of the Walsh-Healey Act.

2. The terms of the Portal-to-Portal Act indicate also that Section 6 was not intended to apply to suits by the United States to enforce any provision of the Walsh-Healey Act, including the wages and hours provisions. Findings of Section 1 (a), for example, are inconsistent with any such intention, as are certain substantive provisions. The clear purpose of Section 6 was to remedy the problems arising out of the different periods of limitation under the various state laws, a consideration inapplicable to the United States on which state statutes of limitation are not controlling. Further, the other sections of the Portal-to-Portal Act which were intended to be

applicable to the United States use far more comprehensive language than that of Section 6.

B. The general legislative history of the Portal-to-Portal Act is marked by three factors: (1) The basic concern of Congress was to bar employee suits, and the legislative proceedings were almost wholly directed to this problem, and not to Government enforcement actions. (2) Congress apparently assumed that employees had a right of action under the Walsh-Healey Act. (3) Insofar as the statute of limitations was considered, the principal concern of Congress was the lack of uniformity among the state statutes of limitations.

This legislative history is consistent with the Government's contention that Section 6 was not intended to apply to any suit by the Government to enforce the provisions of the Walsh-Healey Act. With respect to child labor violations of the Walsh-Healey Act, the history makes it quite clear that those provisions are completely beyond the scope of Section 6 of the Portal-to-Portal Act.

II

Assuming *arguendo* that Section 6 was intended to apply to suits brought by the United States, the present suit was nevertheless timely filed. For the purposes of Section 6, a "cause of action accrues" only at the time that it is administratively determined by the Department of Labor, in accordance with Section 5 of the Walsh-Healey Act, that the contractor is liable to the United

States for liquidated damages for violation of the Act. In the alternative, the initiation of those administrative proceedings by the filing of the administrative complaint should be considered the commencement of an "action" for the purposes of Section 6.

A. The burden of the enforcement of the Walsh-Healey Act is upon the Secretary of Labor. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501. The Secretary of Labor's findings as to violation, which are conclusive upon other government agencies and, if supported by a preponderance of the evidence, on the courts, are the sole legal and practical basis for suit by the Attorney General to recover the liquidated damages found due. Further, the doctrine of "primary jurisdiction," see *Far East Conference* v. *United States,* 324 U. S. 570, indicates that the administrative proceedings prescribed by the Walsh-Healey Act are an essential prerequisite to the filing of a suit in the district court.

B. A period of limitation begins to run only after all events prerequisite to suit have occurred. Inasmuch as the statutory scheme makes the administrative findings a prerequisite to court action, the cause of action of the United States cannot accrue until those findings have been made. But even if it be assumed that suit can be brought without the prior administrative determination, it would seem clear that the United

States would have (1) a cause of action which accrues immediately upon violation of the Act, whether or not such violation be known to the Government, and (2) a cause of action which accrues after administrative proceedings have resulted in the determination that liquidated damages are due the United States. The fact that one of these causes may be barred does not prevent suit from being brought on the other.

The lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigation and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time, all demonstrate that the possibility of devising any effective enforcement procedure within the two-year period of Section 6 is extremely remote, and lead to the conclusion that the cause of action should not be deemed to accrue until after the administrative determination. A contrary conclusion would make it virtually impossible to resort to amicable settlements and would completely disrupt, if not destroy, the system of enforcement procedure consistently followed by the Departments of Labor and Justice since the passage of the Walsh-Healey Act in 1936.

C. Assuming that the cause of action accrues when the Act is in fact violated, the initiation of administrative proceedings should be deemed the commencement of an "action" for the purposes of

Section 6. Section 7 provides that "an action is commenced for the purposes of section 6 * * * on the date when the complaint is filed." Construing Section 7 so that the action is considered commenced "on the date the complaint is filed with the Secretary of Labor" would accommodate both the statutory scheme of the Walsh-Healey Act and the assumed intention of Congress in the Portal-to-Portal Act. Such an interpretation would be consistent with the concepts of the "collaborative" and "complementary" interrelationship of the administrative and judicial processes and would avoid the incongruous and eviscerating results the contrary interpretation will produce.

ARGUMENT

I. INTRODUCTORY STATEMENT

A. THE WALSH-HEALEY ACT

The Walsh-Healey or Public Contracts Act, 49 Stat. 2036, as amended, 41 U. S. C. 35–45, was adopted in 1936. It provides that a contractor with the Government for the furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000 must pay his employees minimum wages determined by the Secretary of Labor to be the prevailing minimum wages (Sec. 1 (b), 41 U. S. C. 35 (b)). It prescribes a maximum work week (Sec. 1 (c), 41 U. S. C. 35 (c)), prohibits child and convict labor (Sec. 1 (d), 41 U. S. C. 35 (d)), and requires that the

materials used be manufactured and the contract be performed under sanitary and safe working conditions (Sec. 1 (e), 41 U. S. C. 35 (e)). It further provides for overtime payments, with the permission of the Secretary of Labor, for work in excess of the maximum hours (Sec. 6, 41 U. S. C. 40).

The Act "directs the Secretary to adminster its provisions." *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507; Sec. 4, 41 U. S. C. 38. He is empowered to make "investigations and findings" and to "prosecute any inquiry necessary to his functions" (Sec. 4). He is further authorized to hold hearings "upon his own motion" and "on complaint of a breach or violation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" (Sec. 5, 41 U. S. C. 39). He is directed to "make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and * * * shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act" (Sec. 5).

For violation of the Act, the contractor is liable to pay to the Government as liquidated

damages "the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee" (Sec. 2, 41 U. S. C. 36). Such sums of money due to the United States may be withheld from any amounts due on any such contracts "or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof" (Sec. 2). The monies withheld or recovered as deductions, rebates, refunds, or underpayment of wages—as contrasted with the monies withheld or recovered for the employment of child and convict labor—"shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay * * *: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America" (Sec. 2). For violation of the Act, the United States is authorized to cancel the contract and to make open-market purchases or to enter into other contracts for the completion of the original contract, charging any addi-

tional cost to the contractor (Sec. 2). Further, the Comptroller General is authorized and directed to distribute to all agencies of the Government a list of persons or firms found by the Secretary of Labor to have violated the Act, and no contracts are to be awarded to such persons or firms until three years after the publication of the list unless the Secretary otherwise recommends (Sec. 3, 41 U. S. C. 37). Except as to the one-year limitation upon payment to employees of sums withheld or recovered by the United States, no period of limitation is prescribed as to these several enforcement provisions.

B. THE PORTAL-TO-PORTAL ACT

Events following this Court's interpretation of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201, in *Anderson* v. *Mt. Clemens Pottery Co.* 328 U. S. 680, rehearing denied, 329 U. S. 822, led to the adoption of the Portal-to-Portal Act (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251–262). In that case this Court held that, giving due consideration to the *de minimis* doctrine, time necessarily spent by the employees in walking to work on the employer's premises and in preliminary activities after arriving at their places of work is working time within the scope of the Fair Labor Standards Act.

In the succeeding six months prior to the opening of the First Session of the Eightieth Congress, some 1,900 suits for so-called portal-to-portal claims under the Fair Labor Standards

Act were filed by employees in the United States district courts alone. The amounts claimed in these district court suits amounted to more than five billion dollars. H. Rep. No. 71, 80th Cong., 1st Sess., p. 3. Some of the pending suits asked for amounts which exceeded the working capital or the net worth of the firms sued. S. Rep. No. 48, 80th Cong., 1st Sess., p. 25. Congress concluded that if these suits had been successfully prosecuted, the public Treasury would probably have been deprived of large revenues in that a great number of employers would have been entitled to receive tax rebates, the Government would have been liable to reimburse its wartime cost-plus-fixed-fee contractors, and the amount of renegotiation recoveries would have been substantially reduced. S. Rep. No. 48, *supra*, pp. 32–39. In addition, it appeared that the pendency of these suits would adversely affect the conclusion of new collective bargaining agreements. S. Rep. No. 48, *supra*, pp. 39–40. Further, the impact of the problem was heightened by the fact that the Fair Labor Standards Act contained no limitation provision and the State statutory periods of limitation varied from one to eight years. S. Rep. No. 48, *supra*, pp. 42, 50.

In the opinion of Congress, "a substantial burden on commerce and a substantial obstruction to the flow of goods in commerce" had been created because "wholly unexpected liabilities, immense in amount and retroactive in operation,

upon employers" had been created, with the result that if the claims which were arising were permitted to stand (Portal-to-Portal Act, Sec. 1 (a), 29 U. S. C., Supp. V, 251):

* * * * *

> (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and

employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

* * * * * *

"To meet the existing emergency and to correct existing evils" (Sec. 1, 29 U. S. C., Supp. V., 251), Congress enacted the Portal-to-Portal Act.

The questions which this case presents focus on the effect of the two year limitations provision of Section 6 of the Portal-to-Portal Act (*supra*, p. 3) on suits brought by the United States under the Walsh-Healey Act upon the administrative determination that liquidated damages are due the United States because the employer has violated the child labor provisions of the Walsh-Healey Act. The court below, reading the Portal-to-Portal Act so as to give effect to its provisions as a harmonious whole, and construing

Section 6 in light of the purpose of Congress and the legislative history of the Act, held the two-year period of limitation inapplicable to an action for liquidated damages based on child labor violations.

II. SECTION 6 OF THE PORTAL-TO-PORTAL ACT DOES NOT APPLY TO SUITS BY THE UNITED STATES UNDER THE WALSH-HEALEY ACT

The language of Section 6 of the Portal-to-Portal Act does not expressly and unequivocally refer to the United States, nor does its legislative history reveal an undisputable intention to apply the statute to the United States. It is, of course, "a principle of public policy" "settled beyond doubt or controversy" that a statute of limitations does not apply to the Government unless the intention to make it apply is expressed or clearly manifested. *United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125. As the Court stated in that case (at p. 125):

> It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless

> Congress has clearly manifested its intention that they should be so bound. *Lindsey* v. *Miller,* 6 Pet. 666; *United States* v. *Knight,* 14 Pet. 301, 315; *Gibson* v. *Chouteau,* 13 Wall. 92; *United States* v. *Thompson,* 98 U. S. 486; *Fink* v. *O'Neil,* 106 U. S. 272, 281.

See also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U. S. 112, 121; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *United States* v. *Whited & Wheless,* 246 U. S. 552, 561.

This is but an application of the "old and well-known rule" (*United States* v. *United Mine Workers,* 330 U. S. 258, 272–273) that "a general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States* v. *Wittek,* 337 U. S. 346, 358–369.

This principle is particularly appropriate where, as here, there is no reference in Section 6 to the United States and where the application of the limitations period to the United States would substantially eviscerate the power of the United States to enforce the remedial provisions of the statute, as is its obligation. A comprehensive review of all enforcement actions filed during the fifteen years of the Walsh-Healey Act's existence indicates that the possibility of devising any effective enforcement procedure in the face of a two-year limitations period is extremely

unlikely. Investigation by the Secretary of Labor of Government contractors (a prerequisite to suit under the statutory scheme, see pp. 42-58, *infra*) is frequently delayed of necessity until after the two years have elapsed. But even if (1) investigation results in prompt discovery of a violation, (2) the administrative hearings and inter-departmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and (3) a complaint is filed within two years from the date of the last violation, the bulk of the claim may still be lost. For these claims accrue from day to day and week to week, and not upon the occurrence of a particular event. For every week, therefore, which elapses before the complaint can be filed by the Attorney General in court, one week of the two years' liability is cut off. The consequence is that so little may be left of the claim as to render the sanction of liquidated damages virtually worthless.

In this context, therefore, the application of the principle, that only where there is an unequivocal legislative intent is a statute of limitations to be deemed to restrict the Government, is peculiarly appropriate. Not only is there no express and unequivocal reference in Section 6 to suits brought by the United States, but there is no such indication in the legislative history. Examination of the policy and purposes of the Portal-to-Portal Act, as well as its terms, demon-

strates that Section 6 is directed solely to suits by employees to recover under-payments of wages and not to enforcement actions brought by the United States. More specifically, the "liquidated damages" referred to in Section 6 are those payable to employees under the Fair Labor Standards Act and not those payable to the United States under the Walsh-Healey Act. There is no clear manifestation of a Congressional intent, in the terms of the statute or its legislative history, to apply the limitations provision to the sovereign—a result which would curtail, if not eliminate, effective enforcement of the Walsh-Healey Act and which would completely alter the enforcement system established under the statutory scheme.

A. THE TERMS AND STRUCTURE OF THE PORTAL-TO-PORTAL ACT REFUTE THE IMPUTATION TO CONGRESS OF THE INTENTION TO APPLY SECTION 6 TO SUITS BY THE UNITED STATES

1. *Child Labor Violations.*—As the court below held, with respect to violations of the child labor provisions of the Walsh-Healey Act, the intention of Congress, as manifested by the terms and structure of the Portal-to-Portal Act, is completely unequivocal. As to such violations, the findings of Congress embodied in Section 1 (a) (*supra*, pp. 16–17) are entirely silent. But even more significantly, those findings are plainly inconsistent with any intention to legislate with respect to the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Thus,

Section 1 (a) declares that certain judicial interpretations of the Fair Labor Standards Act[1] were "in disregard of long-established customs, practices, and contracts * * * thereby creating wholly unexpected liabilities," that "the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others," that "employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay," and that there would be "increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee."

But the decisions "in disregard of long-established customs, practices, and contracts * * * creating wholly unexpected liabilities" had no reference whatsoever to child labor. Moreover, the Walsh-Healey Act makes no provision for payment to employees of compensation for child labor violations. Section 2 of the Walsh-Healey Act provides for the payment of liquidated damages for such violations solely to the United

[1] These interpretations would appear to include *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, rehearing denied, 329 U. S. 822; *Jewell Ridge Corp.* v. *Local No. 6167*, 325 U. S. 161; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590; see H. Rep. No. 71, 80th Cong., 1st sess., pp. 2–4.

States (41 U. S. C. 36). Similarly, the Fair Labor Standards Act makes no provision for the payment of compensation to employees for violation of the child labor provisions of that Act. Accordingly, actions by the United States for liquidated damages under the Walsh-Healey Act for child labor violations—or criminal prosecutions under Section 16 (a) of the Fair Labor Standards Act (29 U. S. C. 216 (a)) for child labor violations—could hardly be supposed to "bring about financial ruin of many employers" and to result in "windfall payments" to employees and "increasing demands for payment to employees."

Section 1 (a) further states that as a result of certain judicial interpretations of the Fair Labor Standards Act "champertous practices would be encouraged," employees "would receive windfall payments," "the Public Treasury would be deprived of large sums of revenues," and "the cost to the Government of goods and services * * * would be unreasonably increased." Certainly suits by the United States to enforce the child labor provisions of the Walsh-Healey Act cannot encourage champertous practices, and it can scarcely be suggested that the Act sought to protect the United States against the adverse financial effects of its own suits for liquidated damages to enforce those child labor provisions. Indeed, suits for liquidated damages under the child

labor provisions of the Walsh-Healey Act increased, rather than decreased, the revenues accruing to the public Treasury.

Directly relevant also is the use of the term "liquidated damages" in Section 1 (a). The term first appears in subsection (a) (4) where it is stated that, under these interpretations of the Fair Labor Standards Act, "employees would receive windfall payments, including liquidated damages." Later in its findings in Section 1 (a), after listing the results which it found to have arisen under the Fair Labor Standards Act, Congress declares that all of those results "may (*except as to liability for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest * * * that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act" [emphasis supplied]. These findings reveal that the "liquidated damages" with which Congress was concerned were the double damages payable under the Fair Labor Standards Act only. Congress, it is submitted, expressly negatived any intention to affect liability for liquidated damage under the Walsh-Healey Act.[2] Since, as Congress was aware (see *infra*, pp. ~~111-112, 116~~ 95-97, 113-115, 117), the only remedy granted to the Government under the Walsh-Healey Act

[2] The legislative history, see pp. 93–118, *infra*, indicates the negation of any Congressional intent to affect liquidated damages under the Walsh-Healey Act.

for violations of the child labor provisions, is for liquidated damages, it must be concluded that Section 6 of the Portal-to-Portal Act applies only to possible employee suits under the Walsh-Healey Act and not to actions by the United States for such liquidated damages.[3]

The substantive provisions of the Portal-to-Portal Act inescapably confirm the conclusion we have drawn from the legislative findings. Other than the ambiguous use of the term "liquidated damages" in Section 6, there can be no question that, as used in other sections, that term has reference solely to the double damages for minimum wage and overtime violations of the Fair Labor Standards Act. Thus, Section 2 (e) (29 U. S. C., Supp. V, 252 (e)) provides that "no cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act"—language identical to that used in

[3] Indeed, if Section 6 is held to be applicable to suits brought by the United States to enforce the child labor provisions of the Walsh-Healey Act, a completely anomalous result will ensue. The child labor provisions of the Fair Labor Standards Act—the Act at which Section 6 of the Portal-to-Portal Act was clearly and directly aimed—will not be affected, inasmuch as the sanctions for those violations are criminal penalties. On the other hand, the child labor provisions of the Walsh-Healey Act—an Act which was included only because of the Congressional belief that employee suits could be brought under its terms—will be immediately and substantially affected.

Section 6—"shall hereafter be assignable." Since this provision is plainly inapplicable to the United States, and since employees are not granted the right to recover liquidated damages either under the Fair Labor Standards Act or the Walsh-Healey Act for child labor violations, it is apparent that the term "liquidated damages" in this subsection does not refer to such violations.

The term "liquidated damages" appears elsewhere only in Sections 3 (b) and 11 (29 U. S. C., Supp. V, 253 (b), 260). Section 3 (b) permits an employee to waive his right "to liquidated damages" under the Fair Labor Standards Act (cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945)), and Section 11 makes the award of liquidated damages in an action under the Fair Labor Standards Act "to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages" a matter in the sound discretion of the court. Cf. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 (1942). Since no employee is granted a cause of action under the Fair Labor Standards Act for child labor violations, it is apparent here also that the term "liquidated damages" has no reference to such violations.

Other sections of the Act, which contemplate, but do not expressly mention, "liquidated damages," corroborate the conclusion that "liquidated

damages" does not refer to Government enforcement actions.

Sections 9 and 10 (29 U. S. C., Supp. V, 258, 259) are particularly illuminating since, like Section 6, they are broad provisions which go beyond the narrow problems of claims for travel time and "preliminary" or "postliminary" activities. These sections make good faith reliance on administrative rulings a defense both in civil actions and in criminal prosecutions where the gravamen of the action is the "failure of the employer to pay minimum wages or overtime compensation" under the Fair Labor Standards Act, Walsh-Healey, and Bacon-Davis Acts. As the court below pointed out (R. 52), "although the term 'liquidated damages' is not specifically mentioned, liability for liquidated damages under the Fair Labor Standards Act is clearly included within the purview of these sections since such liability is derived from the 'failure of the employer to pay minimum wages or overtime compensation.' But broad as these sections are, they are limited to the area of minimum wages and maximum hours, and do not even purport to relate to violations of the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Sections 9 and 10 thus represent convincing evidence of the intended scope of the Portal-to-Portal Act."

Analysis of Section 12 leads to the same conclusion. With respect to the applicability of certain "area of production" regulations under the Fair Labor Standards Act, which were held invalid in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, Section 12 provides that "no employer shall be subject to any liability or punishment * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation * * *" (29 U. S. C., Supp. V, 261). Here again, although the term "liquidated damages" is not specifically mentioned, liability for liquidated damages is clearly included within the scope of Section 12 because such liability is derived from an employer's failure to pay "minimum wages" or "overtime compensation" under the Fair Labor Standards Act. Since Section 12 does not purport to relate to the child labor provisions of the Fair Labor Standards Act, Section 12 also furnishes persuasive evidence as to the use of the term "liquidated damages."

Equally revealing is an analysis of other sections of the Act which do not specifically or tacitly employ the term "liquidated damages." Section 2 (a) (29 U. S. C., Supp. V, 252 (a)) retroactively relieves an employer of liability or punishment under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts only where the employer has failed "to pay an employee mini-

mum wages, or to pay an employee overtime compensation." Section 2 (c) (29 U. S. C., Supp. V, 252 (c)) defines compensable activities only with respect to "the application of the minimum wage and overtime compensation provisions" of the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts. And Section 2 (d) (29 U. S. C., Supp. V, 252 (d)) deprives the courts of jurisdiction to enforce liability or impose punishment only for the failure of an employer "to pay minimum wages or overtime compensation" under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts.

Section 4 (a) (29 U. S. C., Supp. V, 254 (a)), like Section 2, relieves an employer of liability or punishment under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts, only "on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation." And Section 4 (d) (29 U. S. C., Supp. V, 254 (d)), like Section 2 (c), defines compensable activities under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts solely with reference to "the application of the minimum wage and overtime compensation provisions."

Although Sections 3 (a), 5, 7 (a) and (b), and 8 speak broadly of "any cause of action" or "action," and do not specifically relate to minimum wage and overtime violations, these sections

also have no reference to child labor violations.[4] Since employees are granted a cause of action solely for wage and hour violations, it is apparent that these sections are concerned only with wage and hour violations.

2. *Wages and Hours Violations.*—Much of the foregoing argument as to the inapplicability of Section 6 of the Portal-to-Portal Act to the child labor provisions of the Walsh-Healey Act is equally germane to suits by the United States generally to enforce the Walsh-Healey Act. For example, the Congressional findings of Section 1 (a) referring to "windfall payments" (p. 16, *supra*), the encouragement of "champertous practices" (p. 16, *supra*), and the reference in the Section to "liquidated damages" (p. 16, *supra*), are all equally inapplicable to suits by the United States to enforce the wages and hours provisions. In addition, the reference of Section 2 (e) to the non-assignability of causes of actions is obviously inapplicable to the United States, and the use of the term "liquidated damages" in Sections 3 (b)

[4] Section 3 (a) (29 U. S. C., Supp. V, 253 (a)) permits the compromise "of any cause of action" under the Fair Labor Standards, the Walsh-Healey, and the Bacon-Davis Acts. Section 5 (29 U. S. C., Supp. V, 216 (b)) amends Section 16 (b) of the Fair Labor Standards Act to substitute class actions for representative actions. Section 7 (a) and (b) (29 U. S. C., Supp. V, 256 (a) and (b)) and Section 8 (29 U. S. C., Supp. V, 257) define when "an action" shall be considered to have been commenced as to an individual plaintiff.

and 11 is obviously directed toward employee suits and not to those brought by the United States.[5]

In our view, the manifestations of Congressional intent in the provisions of the Portal Act point to the interpretation that suits by the United States are not contemplated by Section 6 of the Act, and that the over-all purpose of the Act was, as its name implies, to relieve employers of what Congress regarded as "windfall" claims by employees under the Fair Labor Standards Act for minor "preliminary" or "postliminary" activities.

Specifically pertinent to the limitations provisions contained in Section 6 is the purpose expressed in Section 1 (a) to remedy the problems arising out of "the varying and extended periods of time * * * under the laws of the several

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[5] Also revealing are Sections 3 (a) and 5 (a), which do not specifically employ the term "liquidated damages." Section 3 (a) (29 U. S. C., Supp. V, 253 (a)) permits the compromise of "any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act." This subsection has no relevance to suits brought by the Government since the authority of the Government to enter into compromise has long been established. See 38 Ops. A. G. 94, 98; Executive Order No. 6166, June 10, 1933, 5 U. S. C. 124; cf. *New York* v. *New Jersey*, 256 U. S. 296, 308. Similarly, Section 5 (a) (29 U. S. C., Supp. V, 216 (b)), which substitutes class actions for representative actions under the Fair Labor Standards Act, has no application on its face to Government suits under the Fair Labor Standards Act and the Walsh-Healey Act.

States."[6] Subsections (b) and (c) of Section 6 show that Congress intended only to displace the applicable state statutes of limitations by a uniform federal period of limitation. But state statutes of limitations, of course, are applicable to employee suits only, and have no application to the United States. *Harp* v. *United States,* 173 F. 2d 761, 763 (C. A. 10), certiorari denied, 338 U. S. 816; *United States* v. *Summerlin,* 310 U. S. 414, 416; *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. That Section 6 relates to employee suits rather than to suits by the Government is further confirmed by Sections 7 and 8 (29 U. S. C., Supp. V, 256, 257) which provide, for the purposes of Section 6, that an action shall be considered to be commenced as to an individual claimant on the date that his written consent to become a party plaintiff is filed.

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[6] The entire paragraph in Section 1 (a) under "Findings and Policy" with respect to the issue of limitations reads as follows: "The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry."

This conclusion is substantiated by comparison of Section 6 with those sections of the Act which are applicable to suits by the United States. It is not without significance that where Congress intended to bar suits by the United States, it employed appropriate language to accomplish that purpose. Thus, the use of the words "liability or punishment" in Sections 2, 4, 9, and 10 comprehends actions by the United States for liquidated damages under the Walsh-Healey Act and criminal actions under the Fair Labor Standards Act. See H. Rep. No. 326, 80th Cong., 1st Sess., pp. 9, 16. Further, the use of the word "proceeding" in these sections would appear to relate to administrative means of enforcement as well.[7] The failure of Congress to employ similar comprehensive language in Section 6 is illuminating evidence of the scope of that section.

In summary, the manifestations of congressional intent in the provisions of the Portal-to-Portal Act point to the conclusion that actions by the United States under the Walsh-Healey Act are not affected by Section 6. At the very least, analysis of the terms of the Portal Act as a whole shows that the child labor provisions of the Fair Labor Standards and Walsh-Healey Acts are completely beyond the scope of the Portal Act.

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[7] See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Congress, 1st Session, on H. R. 584, p. 458, Appendix B, *infra*, pp. 100–102.

B. THE LEGISLATIVE HISTORY OF SECTION 6 OF THE PORTAL-TO-PORTAL ACT INDICATES THAT THE INTENTION OF CONGRESS WAS TO BAR POSSIBLE EMPLOYEE SUITS UNDER THE WALSH-HEALEY ACT, RATHER THAN TO CURTAIL ENFORCEMENT OF THE ACT BY THE GOVERNMENT

The courts of appeals, in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5), certiorari denied, 342 U. S. 915 (overtime and child labor), *Lance* v. *United States*, 190 F. 2d 204 (C. A. 4), certiorari denied, 342 U. S. 915 (child labor), *Garfunkel* v. *United States*, decided December 1, 1952 (C. A. 2) (overtime), and *United States* v. *W. H. Kistler Stationery Co.*, decided December 26, 1952 (C. A. 10) (child labor), have held that Section 6 applies to suits brought by the United States under the Walsh-Healey Act. These decisions were based upon an analysis of the terms of the Portal-to-Portal Act without reliance upon its legislative history. The court below has found that the legislative history of the Portal-to-Portal Act supports the Government's contention that Section 6 does not apply to suits brought by it under the Walsh-Healey Act, at least insofar as the child labor provisions of that Act are concerned.

We have shown (*supra*, pp. 21–33) that the text and structure of the Portal-to-Portal Act lead to the opposite result from that reached by the Courts of Appeals for the Second, Fourth, Fifth, and Tenth Circuits. It is our further view that the legislative history of the Act indicates that

the Walsh-Healey Act was brought within the purview of the Portal-to-Portal Act for the principal purpose of eliminating the possibility of employee suits under the Walsh-Healey Act which would circumvent the proposed amendments to the Fair Labor Standards Act. This history, viewed as an integrated whole and not in particularized segments, is consistent with the Government's contention that Section 6 does not apply to any action by the Government to enforce the provisions of the Walsh-Healey Act. It does show that the Portal-to-Portal Act does not affect suits brought by the Government under the child labor provisions of the Walsh-Healey Act.

We believe that, insofar as it relates to the applicability of suits brought by the Government to enforce the wages and hours provisions of the Walsh-Healey Act, there would be little profit in treating the legislative history in detail in this portion of our brief. This history is quite long and an appreciation of the comparatively few significant passages can be obtained only by examining the history as a whole.* We have, how-

* Because of the differences between the House and Senate bills which were submitted to the Conference, it is, perhaps, the Conference Committee action which is the most significant. In this connection, Section 1 of the Senate Bill had stated that "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for attorney's fees, and in

ever, incorporated as Appendix B to this brief (*infra*, pp. ~~93-118~~ 94-119) a comprehensive review of this legislative history, to which we respectfully call the Court's attention. We do believe that there will be little dispute that the course of the bill (H. R. 2157), which was ultimately enacted by the Eightieth Congress as the Portal-to-Portal Act, is marked by three factors: (1) The basic concern of the Congress was to bar employee suits, and the legislative discussions and debates

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the case of the Bacon-Davis Act, for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *." Section 10 (2) of the Senate bill had provided that "No liability for an additional amount as liquidated or other damages under the Walsh-Healey Act" should be predicated on an act done in good faith in reliance on an administrative ruling. 93 Cong. Rec. 2376, 2377. The Conference Committee changed Section 1 to its present form, i. e., "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *." The Committee also eliminated the language in Sections 9 (b) (1) and 10 (2) which spoke of liability for "an additional amount as liquidated or other damages under the Walsh-Healey Act." By these changes the Conference Committee recognized that the Walsh-Healey Act did not allow recovery of additional sums as liquidated damages, and manifested its understanding that the problem confronting Congress had reference solely to the liquidated damages provision of the Fair Labor Standards Act.

Significantly, the Conference Report contains no intimation that the present Section 6 was intended to be applicable

were almost wholly directed to this problem, not to Government enforcement actions. (2) Congress apparently assumed that employees had a right of action under the Walsh-Healey Act. (3) Insofar as the statute of limitations problem was considered, the concern of Congress was the lack of uniformity among the State statutes of limitations, a concern without application to the federal Government, which is of course not controlled by State statutes of limitations.

With respect to child labor violations of the Walsh-Healey Act, we submit that there can be no doubt as to the intention of Congress. As

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to suits by the United States. To the contrary, the thrust of the Report is on the manner in which varying state statutes of limitations—which are inapplicable to the United States—would be superseded by the new uniform federal period of limitation, H. Rep. 326, 80th Cong., 1st Sess., pp. 13–14, as is the explanation of the Report on the floor, 93 Cong. Rec. 4388. Further, although the Report is silent with respect to the applicability of Section 6 to the United States, it elsewhere expressly points out its understanding that employers would be relieved from criminal actions, as well as civil liability, under Sections 2, 9 and 10. (H. Rep. 326, *supra*, pp. 9, 11, 16. The changes made by the Conference Committee and the explanations offered by the Committee of those changes are persuasive evidence that the Walsh-Healey Act was included in Section 6 of the Portal-to-Portal Act, not to curtail enforcement actions brought by the Government, but to prevent possible flanking attacks by employee suits under that Act which would nullify the effect of the amendments to the Fair Labor Standards Act.

we have pointed out before, pp. 21–33, analysis of the terms of the Portal Act as a whole and the purpose of Congress set forth in Section 1 of the Act demonstrate that the child labor provisions of the Fair Labor Standards and Walsh-Healey Acts are completely beyond the scope of the Portal-to-Portal Act. As the court below held, the legislative history of the Act makes that conclusion even more compelling.

Nowhere in the several Committee reports and the lengthy debates is there any suggestion that the proponents of the bill sought to curtail enforcement by the Government of child labor standards. The attention of Congress was directed exclusively to the fields of minimum wages and overtime compensation. According to the House Judiciary Committee, the Walsh-Healey and Bacon-Davis Acts were included in the bill because (H. Rep. No. 71, *supra*, p. 5):

> The Walsh-Healey Act also concerns itself in its field with *minimum wages and overtime compensation.* The Bacon-Davis Act has provisions relating to *minimum wages* and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation. [Emphasis supplied.]

The same scope of the portal-to-portal problem was recognized by the Senate Judiciary Committee. Setting forth the background of the problem, that Committee stated in its report that "attention is invited to three aspects of the [Fair Labor Standards] Act: (1) minimum wages, (2) maximum hours, and (3) 'oppressive child labor.' This report is concerned primarily with aspect (2)." S. Rep. No. 48, *supra*, p. 5. Although the report goes on to discuss minimum wages as well as maximum hours, it nowhere discusses child labor.

Of particular significance here are the comments, with respect to the scope of the limitations provision, of those who guided the bill through Congress. Thus, Mr. Gwynne declared that we should "bear in mind that this limitation applies only to statutory actions, which seek to recover not only the minimum wages or the overtime compensation but an additional amount as liquidated damages, and attorneys' fees and costs," 93 Cong. Rec. 1557. His reference to "*an additional amount* as liquidated damages" clearly relates to actions for minimum wages and overtime compensation, there being no "additional amounts as liquidated damages" in actions for child labor violations. [Emphasis added.] Senator Wiley, the Chairman of the Senate Judiciary Committee, stated "Section 9 (b) provides, similarly, a 2-year statute of limitations as to such *wage claims* when

they are brought under the Walsh-Healey Act or Bacon-Davis Act," 93 Cong. Rec. 2086 [emphasis supplied]. Likewise, Senator Cooper, a member of the Senate Judiciary Subcommittee which considered the bill, observed "with respect to the Walsh-Healey Act and the Bacon-Davis Act, that both acts provide for the payment of *minimum wages for work*. Certainly, if the contracts under those acts affected interstate commerce, the same question of liability for portal-to-portal activities would apply to those contracts as to any other contracts," 93 Cong. Rec. 2130 [emphasis supplied]. And Senator Wherry pointed out that "the real answer, insofar as the Walsh-Healey Act and the Bacon-Davis Act are concerned, is that the evidence before the Senate and the House committees on the pending portal-to-portal suits is equally applicable to support legislation affecting all three acts, for the simple reason that the Walsh-Healey and Bacon-Davis Acts involve payments *for hours worked,*" 93 Cong. Rec. 2193 [emphasis supplied].

Finally, as noted above, fn. 8, pp. 35–36, the limitations provision of the Senate bill (Sec. 9 (b) (1)) referred to "Every claim under the Walsh-Healey Act or the Bacon-Davis Act for unpaid minimum wages or unpaid overtime compensation, and under the Walsh-Healey Act for an additional amount as liquidated or other damages." The reference to "liquidated *or other*

damages" plainly related to actions for unpaid minimum wages and overtime compensation, there being no "other damages" in actions for child labor violations. [Emphasis added.] In eliminating the phrase, "an additional amount," from the present Section 6 of the Act, the Conference Committee undoubtedly intended the same limitation on the scope of the term "liquidated damages." Certainly, there is no evidence of a contrary purpose.

In conclusion, to construe Section 6 of the Portal-to-Portal Act as applicable to the Government in the circumstances here presented would be to construe the Act in a way inconsistent with its history, its terms, and its express policy. Such construction would be particularly inappropriate under the settled rule that statutes of limitations should not be held applicable to the Government "unless Congress has clearly manifested its intention." *United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125. See also cases cited *supra*, pp. 18–19. Where, as here, there is no express reference to the United States in Section 6, its legislative history indicates no such intent, and the construction for which the petitioner contends would seriously impair, if not cripple, the effective enforcement of the statute, as well as upset the established enforcement system—in opposition to the statutory scheme (see pp. 42–53, 59–62, *infra*)—the burden of showing the clear manifes-

tation of Congressional intention to apply Section 6 to the United States cannot be carried.[9] Cf. Pet. Brief, p. 16.

III. IF SECTION 5 OF THE PORTAL-TO-PORTAL ACT APPLIES TO SUITS BROUGHT BY THE UNITED STATES UNDER THE WALSH-HEALEY ACT, THE PRESENT SUIT WAS NEVERTHELESS TIMELY FILED

Assuming *arguendo* that Section 6 of the Portal-to-Portal Act is applicable to suits brought by the United States, the present suit was nevertheless timely filed. Section 6 provides that an "action" which is not commenced "within two years after the cause of action accrued" shall be forever barred. We submit that a cause of action accrues, and the two-year period begins to run, only after it is administratively determined by the Department of Labor, in accordance with the provisions of Section 5 of the Walsh-Healey Act,

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[9] If it should eventually be definitively established that employees cannot maintain their own actions under the Walsh-Healey Act, that would not be evidence that Section 6 of the Portal-to-Portal Act was intended to apply to the United States because the United States is the only party to which it could then apply, as was held in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5). The clear intention of Congress to bar employee suits obviously cannot be converted into an intention to do something else because the courts may ultimately decide that employees do not have the right to sue. The right was apparently assumed when the Portal-to-Portal Act was enacted, and the assumption was by no means without some foundation. Cf. *Filardo* v. *Foley Bros.*, 297 N. Y. 217, reversed on other grounds, 336 U. S. 281.

that the contractor is liable to the United States for liquidated damages for violation of that Act. In the present case, the Government's action was begun eleven months after the conclusion of the administrative proceedings (R. 1, 3). In the alternative, assuming that the Government's cause of action accrues, and the period of limitation begins to run, when the Walsh-Healey Act is, in fact, violated, we submit that the initiation of administrative proceedings is the commencement of an "action" for the purposes of Section 6 of the Portal-to-Portal Act.

A. THE WALSH-HEALEY ACT CONTEMPLATES ADMINISTRATIVE PROCEEDINGS AS A PREREQUISITE TO SUIT BY THE ATTORNEY GENERAL

The basic structure of the Walsh-Healey Act (*infra*, pp. 73–78) and the respective functions of the Secretary of Labor and the Attorney General are clearly revealed in the terms of the Act. The Secretary of Labor is "authorized and directed" to administer the provisions of the Act and "to prescribe rules and regulations with respect thereto" (Sec. 4). He is empowered to "make investigations and findings" and to "prosecute any inquiry necessary to his functions" (Sec. 4). He is further authorized to hold hearings "upon his own motion" and "on complaint of a breach or violation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" (Sec. 5). His sub-

poenas are enforceable in the district courts (Sec. 5). The Secretary is directed to make "findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor * * * shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act" (Sec. 5).

"Unless the Secretary of Labor otherwise recommends," no contracts are to be awarded for a period of three years to any persons or firms "found by the Secretary of Labor" to have violated the Act (Sec. 3). Further, for violations of the Act, the United States is authorized to withhold monies due it as liquidated damages from any amounts due on the contract. Such monies are to be held in a special fund and to be paid "on order of the Secretary of Labor" directly to the employees concerned (Sec. 2). Suits to recover the liquidated damages due the United States, however, are to be "brought in the name of the United States of America by the Attorney General thereof" (Sec. 2).

Pursuant to these statutory directions and authorizations, the Department of Labor early established the procedure of issuing formal complaints and holding hearings before a trial

examiner of the Public Contracts Division where investigation indicated possible noncompliance with the Act. The trial examiner's report is referred to the Public Contracts Administrator for a decision which becomes final unless appealed to the Secretary of Labor. The administrative decision contains the formal determination of liquidated damages and becomes the basis for the application of the administrative sanctions provided by the Act. Upon the failure of the contractor to make payment in accordance with the administrative decision after hearing, the matter is referred to the Attorney General for suit based upon the administrative determination of liability. Rules of Practice, issued July 27, 1939, Wage and Hour Reporter, Bureau of National Affairs, vol. 2, p. 515 (Dec. 11, 1939). Cf. 41 CFR (1949 ed.) Part 203.

The significance of the administrative hearing provisions of the Act is clearly delineated by the decision of this Court in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. There, the district court had refused to direct the enforcement of subpoenas issued by the Secretary of Labor on the theory that the contractor was entitled to a judicial determination of certain issues before being required to produce specified records at an administrative hearing. The court of appeals reversed on the ground that the district court completely misconceived the nature of the ad-

ministrative and judicial functions under the Act. *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 209 (C. A. 2). The Walsh-Healey Act was read by the court as providing for "administrative proceedings * * * contemplating final orders which will be judicially reviewable" (*Id.* at 215). The "final administrative order" was viewed as a determination which would render contractors "liable for liquidated damages, and in a suit for recovery of the same, they will obtain judicial review" (*Id.* at 215).

This Court affirmed the judgment of the court of appeals in terms which leave no doubt that the administrative determination by the Secretary of Labor is a condition precedent to judicial enforcement. After referring to the Secretary's statutory duty to make "findings of fact after notice and hearing" and the circumstances in which the "findings shall be conclusive," the Court in unequivocal language, clearly at odds with petitioner's contention that enforcement proceedings may be instituted by the Attorney General without a prior administrative determination by the Secretary of Labor (Pet. Brief 20), ruled that "Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts." 317 U. S. at 503, 507.

The mandatory character of this submission is evidenced by the Court's statement that "One of

[the Secretary's] *principal functions* is the conclusive determination of questions of fact." It referred to this determination as the Secretary's "statutory duty" and to the computation of liquidated damages as a function "[the Secretary] is required" to perform. It disapproved "action of the District Court" which disabled the Secretary "from rendering a complete decision on the alleged violation *as Congress had directed* [the Secretary] to do." 317 U. S. at 503, 507–509. [Emphasis supplied.]

A similar view was expressed by a specially constituted three-judge court in the Ninth Circuit in *Anderson* v. *Schwellenbach,* 70 F. Supp. 14 (N. D. Cal.). Denying the contractor's prayer for an injunction of pending administrative proceedings, the court stated that "administration of the act is entrusted to the Secretary of Labor who is authorized to make investigations and findings or to delegate these functions to representatives. Among other sanctions the act provides that violation of its standards renders the contractor liable to the United States for liquidated damages in the sum of $10 per day for each infringement of the child and convict labor standards and a sum equal to the amount of underpayments for violation of the minimum wage and overtime standards. Sums due the Government by reason of such violations may be withheld from any amounts owing on such contracts or may be re-

covered in suits brought by the Attorney General in the name of the United States. * * * *The ultimate administrative determination affords the basis for the withholding of sums or the institution of suit by the Government"* (*id.* at 15). [Emphasis supplied.]

Continuing, the court observed that *"If, as the result of the findings and report in the administrative proceeding, suit is brought to recover the damages found due,* the plaintiffs will have opportunity to raise the constitutional point urged. The same will be true in the event plaintiffs are themselves placed under the necessity of suing in consequence of the withholding by the Government of sums due in the contract. * * * Again, it may well turn out that plaintiffs will neither be sued nor put under the necessity of suing. * * * *it may be that the findings in the administrative proceeding will exonerate them from any violation of the act"* (*id.* at 16). [Emphasis supplied.]

In fine, the detailed statutory provisions for administrative proceedings, and the important role assigned the administrative determination in the statutory scheme—which makes that determination conclusive on other government agencies and, if supported by a preponderance of the evidence, on the courts—clearly demonstrate the intention of Congress to make the Secretary of Labor's findings the basis for suit by the Attorney General.

Petitioner's argument to the contrary is based on a fragmentary reading of the statute which separates the sentence in Section 2 providing that suits shall be brought by the Attorney General from the detailed provisions of Sections 4 and 5 confining the administration of the Act in the first instance to the Secretary of Labor. It overlooks the important fact that statutory violations are, unlike ordinary breaches of contract, not self-revealing and that, under the statutory scheme, the Attorney General would have no basis for proceeding except upon the request of, and the information supplied by, the Secretary of Labor. This argument that the Attorney General may commence an action to recover the liquidated damages due the United States prior to the determination by the Secretary of Labor that such sums are in fact due would force a complete revision of the procedures by which such violations are investigated and determined. As is apparent from the statutory scheme, and, as is the practical fact, the Attorney General has no independent basis upon which to commence an action, and the Walsh-Healey Act gives him no power to undertake such an investigation. If it be assumed that Congress intended Section 6 of the Portal-to-Portal Act to apply to the United States, it cannot also be assumed, in the light of the legislative history of the Portal-to-Portal Act, that Congress intended by Section 6 to re-

vise completely the existing procedures for investigation and enforcement under the Walsh-Healey Act.

Moreover, to assume, as petitioner does, that suit may be instituted by the Attorney General without prior administrative proceedings, is wholly inconsistent with the principle reiterated in numerous decisions of this Court that, where Congress has reposed "primary jurisdiction" to make a policy or factual determination in an administrative agency, the courts will stay their hands until the administrative agency endowed with its particular experience has had an opportunity to act, even where the statute does not—as does the Walsh-Healey Act—implicitly require the administrative proceedings to precede judicial action. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439–442; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295; *Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437. The principle that administrative action should be taken before judicial aid is invoked has also been declared in a host of other situations. See, e. g., *Addison* v. *Holly Hill Co.*, 322 U. S. 607; *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

This doctrine was reaffirmed as recently as last Term in *Far East Conference* v. *United States*, 342 U. S. 570, 574–575, in a case where there was not as explicit provision for preliminary administrative determination as in the Walsh-Healey Act:

> The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Of special interest in the present case is the Court's further observation concerning the origin of the doctrine (*id.*, at 575):

> It is significant that this mode of accommodating the complementary roles of

courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction.

Petitioner's argument that the Walsh-Healey Act does not require administrative proceedings to precede suits by the Attorney General is entirely at odds with these decisions, particularly since the Act plainly implies that court action must follow, and be based on, the administrative award. The desirability of achieving uniformity in administration, one of the bases of the primary jurisdiction doctrine, renders the doctrine peculiarly applicable to the Walsh-Healey Act. The Act requires administrative determination for other purposes of the very question which would be in issue in an enforcement action brought by the Attorney General, *i. e.*, whether the contractor had violated the Act. As we have seen, Section 2 of the Act provides for the recovery of liquidated damages not only in suits by the Attorney General in the name of the United States, but also by withholding such sums from any amounts due the contractor. In addition, Section 3 directs the promulgation of a blacklist of the names of those found by the Secretary of Labor to have violated the Act. For such purposes, Section 5 makes the administrative findings "conclusive upon all agencies of the United States." Accordingly, the ad-

ministrative hearings and findings are basic to the application of those administrative sanctions and must necessarily precede their imposition. It follows, we submit, that the administrative hearings and findings must also precede and be the basis of an enforcement action by the Attorney General if the Act is to be read as a harmonious whole.

Indeed, the fact that administrative sanctions have been provided also fortifies the conclusion that Section 6 of the Portal-to-Portal Act was not intended to apply to suits by the United States. Unless the administrative proceedings be regarded as an "action", within the meaning of Section 6, to enforce the Government's cause of action (see *infra*, pp. 66–71), the period of limitation does not apply to the administrative sanctions. Cf. *Dorsey* v. *Reconstruction Finance Corporation*, 197 F. 2d 468, 471 (C. A. 7).. If, therefore, Section 6 is applied to the United States, a completely incongruous result would obtain, depending upon the fortuitous circumstance of the time of the payment for the work performed under the contract. Where the Government owes money to the contractor, it could deduct the liquidated damages and thus collect them administratively even after the elapse of the two-year period. But where the Government had already paid all amounts owed, no enforcement could be had, since no suit could be brought. An intent to have the statute operate in this incongruous fashion should not be at-

tributed to Congress in the absence of the clearest evidence of such a design.[10]

B. THE GOVERNMENT'S CAUSE OF ACTION ACCRUED, AND THE PERIOD OF LIMITATION BEGAN TO RUN, WHEN IT WAS ADMINISTRATIVELY DETERMINED THAT PETITIONER IS LIABLE TO THE UNITED STATES FOR LIQUIDATED DAMAGES

If administrative proceedings and findings are prerequisite to suit by the Attorney General, the Government's cause of action necessarily accrued, and the two-year period of limitation began to run, only after it was administratively determined that petitioner is liable to the United States for liquidated damages.

It has long been settled in this Court and other courts that a period of limitation begins to run only after all events prerequisite to suit have occurred. For "it cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman,* 119 U. S. 587, 602; cf. *Woods* v. *Stone,* 333 U. S. 472; *Fisher* v. *Whiton,* 317 U. S. 217; *Rawlings* v. *Ray,* 312 U. S. 96; *United States* v. *Wurts,* 303 U. S. 414; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Clark* v. *Iowa City,* 20 Wall. 583, 587; *Amy* v. *Dubuque,* 98 U. S. 470,

[10] As indicated earlier, the evidence is all the other way. Cf. *Perkins* v. *Endicott-Johnson Corp.*, 128 F. 2d at 215, n. 20a, which assumes that the Secretary would lift the Section 3 black list (41 U. S. C. 37) as to a particular contractor if his findings were reversed.

475; *Cooke* v. *Gill,* L. R. 8 C. P. 107 (1873); *Read* v. *Brown,* L. R. 22 Q. B. D. 128 (1888); Wood, *Limitations* (4th Ed. 1916), § 122a.[11] As this Court stated in *Woods* v. *Stone,* 333 U. S. at 477, "It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred."

This observation is directly pertinent here. The present suit is based upon an administrative determination that petitioner is liable to the United States for liquidated damages for violation of the Walsh-Healey Act. To hold that the two-year period of limitation began to run prior to that determination is necessarily to include "a period during which an action could not be commenced" by the Government. In the light of the statutory scheme which makes the administrative determination a prerequisite to suit, any such holding would not, we submit, be warranted. Cf. *Schaeffer* v. *United States,* 114 C. Cls. 568, cer-

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[11] See also *Dusek* v. *Pennsylvania R. Co.*, 68 F. 2d 131 (C. A. 7); *Paulson* v. *United States*, 78 F. 2d 97, 99 (C. A. 10); *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. 2d 283 (C. A. 5), certiorari denied, 302 U. S. 738; *Bass* v. *Standard Accident Insurance Co.*, 70 F. 2d 86, 87 (C. A. 4); *Taylor* v. *Salt Creek Consol. Oil Co.*, 285 Fed. 532, 541 (C. A. 8); *Cary* v. *Koerner*, 200 N. Y. 253, 259; *Dept. of Banking* v. *McMullen*, 134 Neb. 338, 345; *Farneman* v. *Farneman*, 46 Ind. App. 453, 457.

tiorari denied October 20, 1952, No. 232, this Term.[12]

Prior to the decision of the Fifth Circuit in the *Lovknit* case (*supra,* p. 33), five different district judges, in reliance upon the same understanding of the prime importance of the administrative determination under the Walsh-Healey Act that is evidenced in the *Endicott Johnson* and *Anderson* cases (see *supra,* pp. 44–47), held the Government's action not barred if brought within two years after the administrative determination. *United States* v. *Hudgins-Dize Co., Inc.,* 83 F. Supp. 593 (E. D. Va., Bryan, J.); *United States* v. *Harp,* 80 F. Supp. 236 (W. D. Okla., Broaddus, J.), affirmed on other grounds, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816; *United States* v. *Craddock-Terry Shoe Corp.,* 84 F. Supp. 842 (W. D. Va., Paul, C. J.), affirmed on other grounds, 178 F. 2d 760 (C. A. 4); *United States* v. *Sweet Briar, Inc.,* 92 F. Supp. 777 (W. D. S. C., Wyche, J.); *United States* v. *Lance, Inc.,* 95 F. Supp. 327 (W. D. N. C., Warlick, J.), reversed, 190 F. 2d 204 (C. A. 4). As the carefully reasoned opinion of District Judge Paul in the *Craddock-Terry Shoe Corp.* case points out (84 F. Supp. 846):

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[12] In the *Schaeffer* case, the Government contended that the particular administrative proceedings there concerned—claims before the War Shipping Administration for just compensation under Section 902 of the Merchant Marine Act, 46 U. S. C. 1242—were not legally prerequisite to suit, but the Court of Claims took a different view.

> It seems the plain intendment of the statute that administrative proceedings, consisting of the hearing, the findings of fact, and the decision of the Secretary, shall be the process whereby the Secretary determines whether the United States has a claim and the amount of it; and only when this has been determined and the contractor has refused payment, is resort to be had to the courts. The administrative proceedings appear to be a prerequisite to an assertion of the claim for damages; and it would appear that not until the conclusion of these proceedings with the Secretary's decision does the Government have a right of action in the courts for collection of the damages. * * * *

But even if it be assumed that suit can be brought without a prior administrative determination, it can hardly be denied that the Act clearly authorizes a suit based on the administrative decision. This necessarily follows from the explicit provision, among others, making the administrative decision conclusive upon the courts, if supported by a preponderance of the evidence. *Harp* v. *United States*, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816.[13] Thus, even if

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[13] Petitioner's suggestion (Pet. Brief 18–19) that the "conclusive effect" which is to be given to the Secretary of Labor's findings in "any court of the United States" is not necessarily applicable to suits brought by the Attorney General upon the findings of the Secretary that there has been a violation of the Walsh-Healey Act, clearly has no merit. The only court

the courts can entertain suit without a prior administrative proceeding; the complementary roles assigned the Secretary of Labor and the courts strongly suggest that, at the very least, two causes of action are available to the Government: (1) a cause of action which accrues immediately upon violation of the Act, whether or not such violation be known to the Government; and (2) a cause of action which accrues after administrative proceedings have resulted in the determination that liquidated damages are due the United States.

Where two causes of action are available in a given set of circumstances—one based on an administrative determination of liability and the other on the violation itself—the one is not barred merely because the other, if brought, would have been. *Bonwit Teller & Co. v. United States,* 283 U. S. 258; *United States v. Whited & Wheless,* 246 U. S. 552; *Independent Coal Company* v. *United States,* 274 U. S. 640, 650. "This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in *Lamb* v. *Clark,* pp. 193, 198, it was tersely stated as then familiar doctrine

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proceeding mentioned in the Walsh-Healey Act is that brought by the Attorney General to enforce the Secretary's findings. The statute cannot be read to exclude the "conclusive effect" of the findings from the only court action the statute expressly contemplates.

that 'If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.' And the principle has frequently been recognized by this and other courts." *United States* v. *Whited & Wheless, supra,* at 564. Accordingly, the present cause of action, which the complaint clearly shows is based on the Secretary of Labor's decision, did not accrue until the amount of the liquidated damages had been fixed by him, and is not barred even if a suit based directly upon the violation itself would be barred.

That there is no period of limitation upon the commencement of administrative proceedings does not argue against the correctness of this view. At the time of enactment, no period of limitation was placed in the Walsh-Healey Act upon enforcement by the Government. There is no suggestion anywhere in the legislative debates relating to the Portal-to-Portal Act, passed some eleven years later, that any abuses or evils resulted from failure to provide a period of limitation for Government actions under the Walsh-Healey Act.

Moreover, the lack of any limitations bar upon the enforcement of public law is not an unusual condition. On the contrary, as already pointed out, statutes of limitations do not ordinarily apply to the Government. This is "an element of the English law from a very early period." *United*

States v. *Thompson*, 98 U. S. 486, 489; see also *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *duPont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless*, 246 U. S. 552. Nor is there any inequity where, as here, the statute "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507. The contracts in the present case were executed at a time when it was absolutely clear that no period of limitation was applicable.

On the other hand, enforcement of the Act would be seriously impaired if, as petitioner contends, investigation, discovery of violations, institution of administrative proceedings, preparation for and conduct of hearings, making of the initial administrative findings, completion of successive administrative appeals, rendition of the final administrative determination, and institution of suit by the Attorney General—the administrative procedure contemplated by the Act and put into practice by the Secretary of Labor—must all be accomplished within two years after the violation.

As we have indicated (*supra*, pp. 19–20), a comprehensive review of enforcement actions indicates that the possibility of devising any effective

enforcement procedure in conformity with petitioner's interpretation of the limitations provision is extremely remote. It is extraordinarily difficult to commence an action to collect liquidated damages, the principal sanction for enforcing the Act, within two years after the violations. The lapse of two years or more before court action arises from a variety of factors—lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigation and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time.

Though the Secretary of Labor receives reasonably prompt notice of the award of a contract subject to the Act, there are far too many contracts to permit inspection in all cases. Even in normal times, appropriations permit inspections of only about one-fourth of the number of contractors each year. An attempt is made to investigate new contractors, *i. e.*, those who have not previously held Government contracts, prior to the completion of the first contract. But most other contractors cannot, as a practical matter, be investigated prior to the completion of their contracts. Thus, more than two years may have elapsed before an inspection can even be made. This problem is greatly aggravated, of course, by the tremendous current increase in the number of contractors by reason of the national emergency.

The ratio of inspections to contractors has sunk to approximately 17 percent.

Moreover, even if investigation results in prompt discovery of a violation, the administrative hearings and inter-departmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and a complaint is filed within two years from the date of the last violation, the bulk of the Government's claim may still be lost. Unlike most causes of action which arise in full amount upon the occurrence of some event, these claims accrue from day to day and week to week as under-age minors are employed or as the employer fails to pay the required wages. Thus, when an investigator discovers an employer who has been violating the Act over the preceding two years, one week of the two years' liability would be cut off for every week which elapses before the complaint is filed in court. Accordingly, even if all of the intervening events are accomplished within a period of two years, so little would be left of the claim that the sanction of liquidated damages would be vitiated.

Finally, the construction of the limitations provision which petitioner urges is one which would make it virtually impossible to resolve cases by amicable settlement without resort to the courts. In most cases where violations are found, under the present enforcement procedures, the contractor will voluntarily pay the liquidated damages

without the institution of administrative proceedings, and court action is required in very rare instances. The importance of such amicable settlements in the program of enforcement is apparent from the fact that, in the period from July 1, 1948, through September 30, 1952, violations giving rise to a claim for liquidated damages were discovered in over 3,733 cases,[14] but it was found necessary to institute formal administrative proceedings in only 82 cases and to bring suit in only 32 cases. If petitioner's view were to be adopted, the Government would be compelled to file suit even though settlement negotiations were still in progress, thus placing an additional burden on the courts.

In sum, the interpretation of the limitations provision for which petitioner contends would disrupt the system of enforcement procedure consistently followed by the Departments of Labor and Justice since the passage of the Act, and would frustrate the objective of the Act to use the national purchasing power to "raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507.

[14] Thirty-seventh Annual Report of the Secretary of Labor, p. 89; Thirty-eighth Annual Report of the Secretary of Labor, p. 219; 1951 Annual Report of the Wage and Hour and Public Contracts Division, Department of Labor, p. 18, table 7; 1952 Annual Report of the Wage and Hour and Public Contracts Division, Department of Labor, p. 30, table 8; Quarterly Summary of Statistics, Department of Labor, Wage and Hour and Public Contracts Division, first quarter of 1953 fiscal year, p. 3.

The position we urge is neither foreclosed by, nor inconsistent with, this Court's decisions in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, and *McMahon* v. *United States*, 342 U. S. 25. The question involved in the *United Engineering* case bears little, if any, resemblance to the present one. There, the issue was whether the word "injury" in Section 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 913 (a))—which provides that "The right to compensation for *disability* under this Act shall be barred unless a claim therefor is filed [with the Deputy Commissioner] within one year after the *injury*" [emphasis supplied]—should be construed to mean compensable injury or accident. The Court held that "Congress knew the difference between 'disability' and 'injury' and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein 'disability' is related to the right to compensation, while 'injury' is related to the period within which the claim must be filed," 342 U. S. at 199. Contrary to petitioner's reading of the case (Pet. 8, Pet. Brief 19–20), no issue was there raised with respect to whether an administrative determination of "disability" or "injury" was prerequisite to the accrual of a cause of action in favor of the employee. Rather, the limitations provision related to the time in which the

employee could file his claim with the administrative agency.

The similarities between the statute of limitations issue in the *McMahon* case and the issue here presented are entirely superficial. The Court there held that the two-year limitations provision in the Suits in Admiralty Act (46 U. S. C. 745) runs from the date of the actionable wrongs rather than from the date of the administrative disallowance of the seaman's claim against the Government. But that holding rests upon the particular legislative situation there involved and upon other grounds not present in the instant case.

The primary ground for the decision appears to be contained in the following paragraph (342 U. S. at 27):

> It [the Suits in Admiralty Act] was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such claims as this, there was no indication of any change in the limitation contained in the older Act.

The situation here is precisely the reverse. The limitations provision is part of the Portal-to-Portal Act of 1947, enacted some eleven years after the Walsh-Healey Act, which gives rise to the

substantive claim. During this entire eleven-year period, the Act was consistently construed and enforced on the assumption that the administrative determination of liability, and not the violation itself, gives rise to the claim on which suit could be brought. This ground of the *McMahon* decision is, therefore, entirely lacking in this case.

Another basis is that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *Ibid.* This principle, far from supporting petitioner, suggests the applicability of the equally well-established principle that statutes of limitation "are to be construed strictly in favor of the sovereign." *United States* v. *Whited & Wheless,* 246 U. S. 552; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456.

The remaining reason specified in the *McMahon* opinion is that (342 U. S. at 27):

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus *to delay indefinitely knowledge by the Government that a claim existed.* We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of *an action*

against the United States. [Emphasis supplied.]

In the instant case, on the other hand, petitioner would construe the limitations provision in such a manner as to prejudice claims *by* the Government and to start the period running before there is opportunity for the acquisition of "knowledge by the Government that a claim existed." Unlike the situation in the *McMahon* case, where the *claimant* knows immediately of the injury out of which his claim arises, under the Walsh-Healey Act the *defendant* contractor knows of the violations of the Act at the time they occur, but such violations do not come to the attention of the Government until an investigation can be conducted, which may be long after the violations have occurred. Thus, much, if not all, of a two-year period may have expired before the violations even come to the attention of the Government. This consideration strongly suggests a legislative intent quite different from the legislative intent in the *McMahon* situation. Cf. *United States* v. *Wurts,* 303 U. S. 414; *Woods* v. *Stone,* 333 U. S. 472, 477.

C. ASSUMING THAT THE GOVERNMENT'S CAUSE OF ACTION ACCRUED, AND THE PERIOD OF LIMITATION BEGAN TO RUN, WHEN THE WALSH-HEALEY ACT WAS VIOLATED, THE INITIATION OF ADMINISTRATIVE PROCEEDINGS WAS THE COMMENCEMENT OF AN "ACTION" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE PORTAL-TO-PORTAL ACT

Up to this point, we have argued that, even if Section 6 of the Portal-to-Portal Act applies to

suits by the Government under the Walsh-Healey Act, the Government's cause of action accrues, and the period of limitation begins to run, when it is administratively determined that liquidated damages are due the United States. Assuming, however, that we are in error in that view and that the cause of action accrues, and the period of limitation begins to run, when the Walsh-Healey Act is, in fact, violated, the further question remains whether the initiation of administrative proceedings may be deemed to be the commencement of an "action" for the purposes of Section 6. In the present case, administrative proceedings were instituted within two years of the violations (R. 3, 36).

Section 7 of the Portal-to-Portal Act states that "an action is commenced for the purposes of section 6 * * * on the date when the complaint is filed." It is evident from our prior discussion, *supra*, pp. 21–42, that, even assuming the applicability of the Portal-to-Portal Act to Government suits, Congress was primarily concerned with employee suits. The terms of the Act were designed to deal with the problems raised by such suits, and the language employed by Congress is inept when sought to be applied to the Government. This is particularly true with respect to Section 7 in light of the integral role assigned by the Walsh-Healey Act to administrative proceedings in the enforcement of the Act. Since there is no evidence of any legislative intent to

emasculate enforcement of the Walsh-Healey Act, we suggest that Section 7 should be construed in a manner which would accommodate both the statutory scheme of the Walsh-Healey Act and the intention of Congress in the Portal-to-Portal Act to provide a fixed period of limitation, *i. e.*, that an action be considered to be commenced "on the date when the complaint is filed *with the Secretary of Labor.*"

This interpretation would be consistent with present concepts of the "collaborative" and "complementary" interrelationship of the administrative and judicial processes. Cf. *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d at 216, 225 (C. A. 2). The analogy between administrative and judicial proceedings has frequently been recognized. In *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 15, an administrative proceeding was deemed to be "analogous to a suit in equity to obtain an injunction, and should be governed by like considerations." The right to withdraw a registration statement, the Court held, was governed by the principles relating to the right of a judicial suitor to dismiss the proceeding he instituted. *Id.* at 19. Similarity was also perceived in *Morgan* v. *United States*, 298 U. S. 468, 480, where the Court observed:

> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an

> order supported by such findings, has a quality resembling that of a judicial proceeding.

See also *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 140–141; *United States* v. *Morgan*, 313 U. S. 409, 422; *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 274–277.

As previously pointed out, it has always been the practice to initiate Walsh-Healey hearings by the issuance of a formal complaint alleging the specific violations with which the contractor is charged. Respondent then files an answer, and public hearings are held before a trial examiner, during which witnesses are examined and cross-examined. Formal findings of fact and conclusions of law are issued, and the respondent is afforded an opportunity for review by the Secretary of Labor of the trial examiner's determination. The administrative proceedings under the Act closely resemble, therefore, the normal judicial trial.

To treat the initiation of those proceedings as the commencement of the "action" under the Walsh-Healey Act would have the advantage of avoiding the results previously described, pp. 60–62. It would pay due deference to the statutory scheme of the Walsh-Healey Act, and would be in accord with the doctrine of "primary jurisdiction" under which the courts, even though possessed of concurrent jurisdiction, stay their hands

until the administrative agency has had an opportunity to act. Finally, this interpretation would serve the basic purpose of the limitations provision by avoiding indefinite postponement of the period of limitation and providing notice of the existence of the Government's claim.

That there would be no specific period of time in which the Government would be required to bring suit based on the administrative determination is not, we believe, a material defect. Presumably, such suits would be brought within a reasonable period thereafter—a period measurable in terms of whether the contractor could make a showing of prejudice resulting from the delay. Cf. *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 31.

We submit, therefore, that, if the Government's cause of action be deemed to accrue at the time of violation rather than at the date of administrative determination of liability, the objectives of the Portal-to-Portal and Walsh-Healey Acts can best be reconciled by a holding that the initiation of administrative proceedings under the Walsh-Healey Act is the commencement of an "action" for the purposes of the limitation provision.[15]

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[15] In *McMahon* v. *United States*, 342 U. S. 25, the Government took the position that the pendency of the administrative proceedings there concerned did not toll the statute of limitations. But we further pointed out that the maximum sixty-day waiting period involved in that case did not de-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1953.

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prive the claimant of "a reasonable time within which to file" his claim. Brief for the United States, No. 17, Oct. Term 1951, p. 26 n. 17. The problem which the administrative proceedings required by the Walsh-Healey Act present is a completely different one from that posed by the fixed sixty-day waiting period involved in *McMahon*. Accordingly, we feel that there is no inconsistency in presenting the following additional suggestion to the Court:

Since under the scheme of the Walsh-Healey Act many normal incidents of the judicial process occur in the administrative proceedings, it would seem appropriate, if the issuance of a complaint by the Secretary of Labor is not regarded as the commencement of an enforcement action, to toll the statutory period during the pendency of the administrative proceedings so that the time consumed in part of the enforcement process would not be charged against the period of limitations. Cf. *McMahon* v. *United States*, *supra*, at 28. Though a relatively small portion of this particular claim would thus be saved; the effect of such a ruling would substantially mitigate the drastic effects of the decision in the *Locknit* case (*supra*, p. 33), and might afford a practicable means of devising new enforcement procedures.

APPENDIX A

1. Sections 1–6 of the Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, as amended, 41 U. S. C. 35–40, provide as follows (as they appear in the United States Code):

SECTION 1. That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of indus-

tries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled "Fair Labor Standards Act of 1938";

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account

such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to

time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representatives designated by him, shall have jurisdiction to issue to such person an order requiring

such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and hereby is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all

provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided,* That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 1 of this Act.

2. The Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251–262, provides as follows:

Part I

Findings and Policy

Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations,

halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and

adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in Commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Part II

Existing Claims

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was en-

gaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall

hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

SEC. 3. COMPROMISE OF CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to or on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended, to liquidated damages, in whole or in part, with respect to activities engaged in prior to the date of the enactment of this Act.

(c) Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release."

Part III

Future Claims

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Part IV

Miscellaneous

SEC. 5. REPRESENTATIVE ACTIONS BANNED.—

(a) The second sentence of section 16 (b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

(b) The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

SEC. 8. PENDING COLLECTIVE AND REPRESENTATIVE ACTIONS.—The statute of limitations prescribed in section 6 (b) shall also be applicable (in the case of a collective or representative action commenced prior to the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after the date of the enactment of this Act. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency

of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

SEC. 12. APPLICABILITY OF "AREA OF PRODUCTION" REGULATIONS.—No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer—

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

SEC. 13. DEFINITIONS.—

(a) When the terms "employer", "employee", and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

(b) When the term "employer" is used in this Act in relation to the Walsh-Healey Act or Bacon-Davis Act it shall mean the contractor or subcontractor covered by such Act.

(c) When the term "employee" is used in this Act in relation to the Walsh-Healey Act or the Bacon-David Act it shall mean any individual employed by the contractor or subcontractor covered by such Act in the performance of his contract or subcontract.

(d) The term "Walsh-Healey Act" means the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), as amended; and the term "Bacon-Davis Act" means the Act entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics

employed by contractors and subcontractors on public buildings" approved August 30, 1935 (49 Stat. 1011), as amended.

(e) As used in section 6 the term "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

SEC. 14. SEPARABILITY.—If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE.—This Act may be cited as the "Portal-to-Portal Act of 1947."

APPENDIX B

Legislative History of Section 6 of the Portal-To-Portal Act

[The following legislative history is, as suggested in the brief, a comprehensive review of the significant bills, debates, hearings and reports pertaining to Section 6 of the Portal-to-Portal Act.]

a. *Seventy-ninth Congress.*—A proposed uniform federal statute of limitations aimed at the creation of one federal limitations period for a large number of federal statutes was presented to the Seventy-ninth Congress, between the decisions of this Court in *Jewell Ridge Corp.* v. *Local No. 6167,* 325 U. S. 161; *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, on the one hand, and *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, on the other. This bill (H. R. 2788) and the bill which ultimately became the Portal-to-Portal Act (H. R. 2157, 80th Cong.) were both introduced by Representative Gwynee. As submitted to the House by the Judiciary Committee, H. R. 2788 declared that "except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties, or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued." H. Rept.

No. 1141, 79th Cong., 1st Sess.[1] According to the Committee, the bill would affect, among other causes of action, "suits for double the amount involved plus costs and attorney fees for violation of sections of the Fair Labor Standards Act relating to minimum pay and maximum hours (29 U. S. Code, sec. 216)" and "suits by the United States for liquidated damages based on failure of any contractor to comply with terms of contract as to wages, hours, etc. (41 U. S. Code, sec. 36)." H. Rept. No. 1141, *supra;* p. 2.

Despite the broad language of the bill and this express statement in the Committee Report as to the scope of the bill, and despite earlier remarks by Congressman Gwynne, 91 Cong. Rec. 2928, the members of the Committee made it quite

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[1] In full, the bill provided as follows:

"That hereafter, except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties, or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued: *Provided*, That causes of actions which had accrued prior to the passage of this Act, and which had not become barred by any applicable statute of limitation may be maintained if commenced within six months after the date of enactment: *Provided further*, That no liability shall be predicated in any case on any act done or omitted in good faith in accord with any regulation, order, or administrative interpretation or practice, notwithstanding that such regulation, order, interpretation, or practice may, after such act or omission, be amended rescinded, or be determined by judicial authority to be invalid or of no legal effect. No limitation under this Act shall apply if the person liable for such damages shall not be found within the United States, within the same period, so that proper process may be instituted and served against such person."

clear during the debates in the House that the bill did not apply to civil or criminal suits by the Government. 92 Cong. Rec. 5293, 5294, 5295, 5298, 5299, 5301, 5305. Thus Mr. Gwynne stated (92 Cong. Rec. 5295):

> Now, to get on to what the bill does not cover. The bill does not cover criminal prosecutions, Mr. Justice Drew Pearson to the contrary notwithstanding. *It does not cover injunctions or any kind of special proceedings whatever.* It does not cover any Federal statute giving anyone the right to sue if a special period of limitation is provided in the particular statute. For example, you will recall that in the price-control law we provided that under certain circumstances a purchaser may sue a seller for $25 or $50 or something of that kind. We wrote into that statute a year's limitation. So that is not affected by this particular bill. Finally, *it does not affect suits brought by the United States Government itself* for the following reason: At common law a general statute beneficial to the crown affected the crown, but any restrictive statute did not bind the sovereign; it did not apply to the sovereign unless the sovereign was specifically named in the statute. That rule has been affirmed by our own Supreme Court on many occasions. Those of you who are interested might read the case of *United States* v. *Heron* (21 Wall. 251) and *United States* v. *Thompson* (98 U. S. 456), where the Court held a statute of limitation, for example, which is restrictive does not apply to the Government unless the Government is specifically named. The Court also held to the same effect in connection with insolvency statutes.

> However, recent decisions, as is often the case, have in the minds of some people thrown a little doubt on what the Supreme Court might hold. *I had no intention of writing a statute to cover the Government.* So the committee did the conservative thing and in the report set out all the statutes that could possibly be affected, whatever position might be taken by the Court in the future on the theory I have just related. In order to avoid any possible trouble whatever, we thought it would be well—in fact, an amendment will be offered by the gentleman from Tennessee [Mr. KEFAUVER] to make it clear that this bill does not apply to any suits brought by the Government. [Emphasis supplied.]

Subsequently, Mr. Hobbs, who submitted the report from the Judiciary Committee, offered an amendment for that purpose, adding the proviso "except actions brought by the United States as the real party in interest" after the words "no action * * * pursuant to any law of the United States." 92 Cong. Rec. 5305. In response to an inquiry from Mr. Kefauver, who proposed, in behalf of Mr. Walter,[2] to insert the language "That the provisions of this Act shall not apply to actions in which the United States or an agency or an officer thereof is plaintiff," Mr. Hobbs stated that both amendments would accomplish the same purpose. *Ibid.* Mr. Kefauver did not,

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[2] Mr. Walter, a member of the Committee, had filed a minority report expressing the view that the bill would have a detrimental effect upon law enforcement if applicable to actions by the United States. See H. Rep. No. 1141, *supra*, Part 3.

> Mr. VORYS. Can the employee recover for any work for which his employer agreed to pay him under the longer statute of limitations? I think that is obviously the case.
>
> Mr. CELLER. If the claim is brought under the Bacon-Davis Act or under the Walsh-Healey Act, or under the Fair Labor Standards Act, if we pass this bill which is applicable to all three acts, there is only 1 year in which the claim can be brought in court.
>
> Mr. VORYS. That is perfectly true, but the man would still have his right under the common law to recover if the employer agreed to pay him.

In sum, there is substantial evidence for the view that the limitations provision of H. R. 2157, as passed by the House, was not intended to apply to suits by the United States.

(ii) *Senate.*—After its passage in the House, H. R. 2157 was referred to the Senate Judiciary Committee. Earlier, that Committee had held hearings on S. 70, a bill introduced by Senator Wiley, which sought to amend the Fair Labor Standards Act in order to exempt employers from liability for portal-to-portal claims. This bill, and a substitute offered by Senator Capehart, were limited to the Fair Labor Standards Act and had no reference to the Walsh-Healey and Bacon-Davis Acts. See Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 80th Cong., 1st Sess., on S. 70, pp. 3–5. Neither the Wiley bill nor the Capehart substitute was reported out by the Committee. Instead, the Committee reported out the House-passed Gwynne bill, H. R. 2157, with an amend-

ment in the nature of a substitute. S. Rep. No. 48, 80th Cong., 1st Sess. This substitute was ultimately passed by the Senate without significant amendment.[8]

The limitations provisions of H. R. 2157, as amended by the Senate, were contained in what was then Section 9 of the bill. Subsection (a) of Section 9 provided that:

> The Fair Labor Standards Act of 1938, as amended, is further amended by adding at the end of section 16 the following new subsection:
>
> (c) (1) Every claim under this Act for unpaid minimum wages, unpaid overtime compensation, or an additional amount as liquidated damages, accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947, shall be forever barred unless, within two years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction.
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> * * * * *

Subsection (b) (1) similarly provided that:

> Every claim under the Walsh-Healey Act or the Bacon-Davis Act for unpaid minimum wages or unpaid overtime compensation, *and under the Walsh-Healey Act for an additional amount as liquidated or other damages,* accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947, shall be forever barred unless, within 2 years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction. [Emphasis supplied.]

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[8] The text of the bill as passed by the Senate is set forth at 93 Cong. Rec. 2375–2377.

It might be argued from this language that the Committee intended the limitations bar to apply to suits by the United States under the Walsh-Healey Act. On this score, the Committee report states only that "Subsection (b) of this section amends the Walsh-Healey Act and the Bacon-Davis Act setting up a 2-year statute of limitations with respect to claims accruing under such acts prior to or on or after the date when this bill becomes law" (S. Rep. No. 48, *supra*, p. 51). In our view, both the bill and the report are ambiguous and leave the matter at large.

Whatever the actual intention of the Committee may have been, it is apparent that it acted on a misconception of the enforcement provisions of the Walsh-Healey Act. Thus, subsection (b) of Section 9 of the bill speaks of "an additional amount as liquidated or other damages" under the Walsh-Healey Act; similarly, the statement of findings in Section 1 of the Senate bill states that "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (*except as to liability for attorney's fees and, in the case of the Bacon-Davis Act, for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *" [emphasis supplied]; and Section 10 (2) of the Senate bill provides that "no liability for an additional amount as liquidated or other damages under the Walsh-Healey Act" shall be predicated on an act done in good faith in reliance on an administrative ruling. But unlike the Fair Labor Standards Act, there is no

provision in the Walsh-Healey Act for "additional" liquidated damages.

This misconception may possibly be ascribed to the fact that the Committee had received no testimony with respect to the Walsh-Healey and Bacon-Davis Acts during the hearings, and was unfamiliar with their provisions. See 93 Cong. Rec. 2123–2124. It was in this connection that the dissenting members of the Committee pointed out, "there is nothing in the record * * * which in any way makes them a part of the portal-to-portal problem" (S. Rep. No. 48, *supra*, Part 2, p. 2). And it was for this reason—that there was no evidence of any kind before the Senate as to the necessity for including the Walsh-Healey and Bacon-Davis Acts in the bill to attain the basic objective of barring portal-to-portal claims—that the opponents of the bill attacked its provisions with respect to those Acts. See 93 Cong. Rec. 2088, 2123, 2250, 2352.

In any event, when called upon during the course of debate in the Senate to explain the inclusion of the Walsh-Healey and Bacon-Davis Acts, the principal proponents of the bill repeatedly stated that their purpose was to bar possible employee suits under those Acts which would circumvent the basic purpose of the Portal-to-Portal Act. Thus, indicating that the Committee had no other purpose, Senator Donnell, Chairman of the Senate Subcommittee which considered the bill, declared that "there is unquestionably a right on the part of employees * * * to assert their rights under the Bacon-Davis or the Walsh-Healey Act. The mere fact that, so far as I know, no such claims [for portal-to-portal

therefore, offer the Walter amendment, and the Hobbs amendment was agreed to. *Ibid.*

This amendment did not make the bill wholly inapplicable to the Walsh-Healey Act since it was apparently assumed that employees could sue under that Act as well as the Fair Labor Standards Act. Thus, Mr. Keefe suggested that the proposed one-year limitation be increased to two years, stating that this "will give adequate time for every employee to bring his action within that period of time against the employer when the facts disclose that he has in fact been underpaid under the provisions of the Walsh-Healey or the Wages and Hours Act." 92 Cong. Rec. 5293.

The bill as passed by the House was reported out by the Senate Judiciary Committee with a minor amendment. S. Rep. No. 1395, 79th Cong., 2d Sess. However, on the floor of the Senate, the Committee substituted an entirely new bill, applicable only to the Fair Labor Standards and Walsh-Healey Acts, which had been drawn by the Department of Justice. The meaning of the provisions of the substitute amendment was not explained to the Senate, and the amendment was passed without debate. 92 Cong. Rec. 10337, 10372, 10373.[3] However, the differences between the House and Senate versions of the bill were not resolved prior to the adjournment of Congress, and the bill died.

b. *Eightieth Congress.*—In the succeeding Congress, after the decision in the *Mt. Clemens* case, Mr. Gwynne introduced a new and broader bill.

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[3] The text of the bill passed by the Senate is set forth at 92 Cong. Rec. 10372.

Subsequent to the hearings held on that bill (H. R. 584), a revised bill was agreed upon, introduced, and reported as H. R. 2157. The latter bill, after considerable amendment, ultimately was enacted as the Portal-to-Portal Act.

(i) *House of Representatives.*—In pertinent part, H. R. 584 imposed a one-year period of limitation on "every action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any law of the United States" (Sec. 2).[4] This provision was quite similar to that contained in the earlier bill, H. R. 2788, 79th Cong. Although such language in the earlier bill had been deemed by its proponents to be inapplicable to suits by the United States, Mr. Walling, the Wage and Hour Administrator, stated during the course of the House Hearings on the bill in answer to a question from Mr. Walter, that "I suppose that it would apply the uniform statute of limitations by way of amendment to recoveries under all of those statutes [Fair Labor Standards, Walsh-Healey and Bacon-Davis Acts] for wages earned but not paid. * * * The effect of this would be seriously to weaken the effectiveness and enforceability of these Acts. * * *" Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., pp. 264–265. Other witnesses, however, appearing

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[4] The text of H. R. 584 is set forth at pages 1–3 of the Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584.

in behalf of industry apparently did not so read the bill.[5]

The testimony of Mr. Smethurst, counsel for the National Association of Manufacturers, is

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[5] Thus, Mr. Smith, Assistant General Counsel of the United States Chamber of Commerce, when asked if he would object to a provision that the United States would be excepted on the matter of limitations, replied (*id.* at 17):

"Of course, that would depend upon whether the committee decided to recommend a broad statute of limitations applicable to all types of actions arising under the Federal law or whether it enacted a limitation applicable only on matters arising under the Fair Labor Standards Act. Possibly it might decide to enact one limited to only a limited class or type of cases. The degree of desirability of the exception for the United States would be related to the character of statute that was finally embodied in the legislation. If it were a broad, general statute of limitations applicable to all types of actions arising under Federal law, it doubtless would be necessary to provide some exemptions in the case of actions brought by the United States Government."

In a colloquy with Mr. Walter, Mr. Haley, attorney for the National Coal Association, proposed an amendment to H. R. 584, stating (*id.* at 385):

"* * * I am not completely convinced that it is necessary, but the sole purpose of the proposed amendment is to make clear that the law will not apply to the United States, when it is a party on its own account, either party plaintiff or party defendant.

"Mr. WALTER. I suppose this section is designed to meet the objections that I made to the Goodwin bill [sic] last year?

"Mr. HALEY. It is designed to meet, yes, the general objections to including the United States when it is the real party at interest. The purpose of my amendment, however, is not to take the United States Government out of the limitation under the Walsh-Healey Act. It would apply to the United States Government under the Walsh-Healey Act only when the United States is suing or being sued on its own account.

particularly interesting in view of subsequent changes to the language of the bill (*id.* at 458):

> Mr. SMETHURST. Just one further point on another provision of the Act. It refers to only actions or causes of action. Presumably it would not deal with this problem under the Public Contracts Act, the Walsh-Healey Act, where there is absolutely no limitation on the time in which the Administrator can proceed backwards, without limitation, to the date when the act was passed in 1936. That is an administrative proceeding. I doubt if it would come within the definition of "action" or "cause of action." But as it stands today he can proceed back with contracts that were performed years and years ago and hold that there was a violation in their performance, and request the employer to reimburse the Government, and then the 1-year provision comes into effect, after the Government has collected from the contractor, and the employees of that contractor have 1 year in which to collect.
>
> But the reference to the "action or cause of action" probably would not get administrative proceedings brought for recovery under the Public Contracts Act.
>
> Mr. GWYNNE. What additional wording would you suggest for that purpose?
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> Mr. SMETHURST. It seems to me just the word "proceedings." "Any action or proceeding" in which the Government is acting not as the real party at interest. Because in those cases the Government is not the real party at interest. They are acting on behalf of someone.
>
> Mr. GWYNNE. Does the Government or Administrator actually bring an action

there? How does he collect his money? Does he not sue in the courts?

Mr. SMETHURST. He may if he is forced to that. But most of the time he sends out a trial examiner, and they hold a hearing, and determine that so much is due. And then he makes an assessment. If the contract has been settled, the Government cannot withhold from the contract price, so he will make an assessment, that restitution should be paid in such an amount. If you do not, he can put you on the blacklist for 3 years.

Mr. WALTER. As a practical matter, what the Government does is to proceed before final settlement is made, and then withholds from the final payment whatever it is determined is owed.

As reported out by the House Judiciary Committee, and as passed by the House without amendment, the limitations provision of the revised bill H. R. 2157 (Sec. 2) was virtually identical to that contained in H. R. 584. It proposed a one-year limitation on "every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any of the laws of the United States."[6]

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[6] The text of H. R. 2157 as reported, and as passed by the House without amendment, is set forth at 93 Cong. Rec. 1517, 1556. Section 2, in pertinent part, states as follows:

"Every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any of the laws of the United States mentioned in section 5 hereof shall be subject to the following limitations and conditions:

"(a) Hereafter no such action shall be maintained unless

Significantly, the word "proceeding" was not added to the limitations provision but was added to the section which barred portal-to-portal claims (Sec. 3). The word "proceeding" ultimately was incorporated into the "portal-to-portal claims" and "good faith reliance" sections of the bill as enacted (Secs. 2, 9 and 10, 29 U. S. C., Supp V, 252, 258, 259), but was omitted from the limitations provision of Section 6 of the Act.

With respect to the effect of the limitations provision then contained in Section 2 of H. R. 2157 upon suits by the Government, the report of the House Judiciary Committee is silent. But in pertinent part, the report declares that "the desirability of a uniform Federal statute of limitations has often been pointed out. In the absence of such a statute, courts are required to enforce the State statute deemed to be applicable. (See

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the same is commenced within one year after such cause of action accrued.

"(b) No such claim or cause of action which had accrued prior to the effective date of this Act, and which would otherwise be barred by subsection (a) hereof, shall be maintained unless action thereon is commenced within 6 months after the effective date of this Act: *Provided, however*, That this subsection shall not be construed to revive or extend any claim or cause of action which but for the enactment of this Act would have been barred by any statute of limitation applicable to such action.

"(c) An action shall be deemed to have been commenced as to any individual claimant as of the date when such claimant is named in such action as a party thereto.

"(d) If at any time within such 1-year period or 6-month period, as the case may be, process may not be served on the person liable by reason of his absence from the United States, the period of such absence shall be disregarded in computing the applicable period."

U. S. Code, title 28, sec. 725.) This has caused confusion and a lack of uniformity throughout the Nation." H. Rep. No. 71, 80th Cong., 1st Sess., p. 7.

Since the Committee was fully aware that state statutes of limitations are inapplicable to the United States (see *supra*, pp. 95–96), it would appear that the limitations provision was not directed to suits by the United States but was intended merely to displace the varied state statutes applicable to employee suits by a uniform federal statute.[7]

On the other hand, it should be noted that Messrs. Walter and Keating filed a statement of "additional views" in which they declared that "the proposal that such a period of limitations also applies to actions brought by the United States is * * * objectionable." H. Rep. No. 71, *supra*, p. 21. Since the report itself says nothing about applying the period of limitation to the Government, this statement may be considered to have been made out of an abundance of caution. It must be remembered that Mr. Walter had made a similar objection in the Seventy-ninth Congress to H. R. 2788 (see *supra*, p. 96, n. 2), and that the Committee members had stated then during the course of debate that such language did not apply to the United States (see *supra*, pp. 95–96).

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[7] The testimony before the Committee with respect to the question of limitations was primarily concerned with the applicability of state statutes of limitations to employee suits. See House Hearings, *supra*, pp. 39–42, 84–87, 120–123, 149–153, 161–162, 258–260, 297–300, 448–449, 466–467.

Examination of the debate in the House would appear to confirm our reading of the limitations provision of H. R. 2157 and the purport of the statement of "additional views" filed by Messrs. Walter and Keating. Although the proposed limitations provision occasioned considerable debate, no statement was made during the course of the debate that the provision was intended to be applicable to suits by the United States. Significantly, although Messrs. Walter and Keating argued in favor of an amendment providing a longer period of limitation (93 Cong. Rec. 1512–1513, 1557–1558, 1558–1559), neither of them proposed an amendment to exclude suits by the United States from the limitations provision. With respect to the limitations provision, the attention of the House was directed to the advisability of displacing the varying state statutes of limitations applicable to *employee* suits by a uniform federal statute of limitations, and the sole point in controversy was the proposed length of such uniform period of limitation. 93 Cong. Rec. 1491, 1495, 1498, 1500, 1502–1503, 1504, 1506–1507, 1512–1513, 1515, 1556, 1557–1558, 1558–1559, 1560, 1561.

That the limitations provision was not intended to apply to suits by the United States is further illustrated by the following colloquy between Mr. Walter and Mr. Hobbs, a member of the Committee, during which Mr. Hobbs stated that the limitations provision was inapplicable to criminal actions brought by the United States (93 Cong. Rec. 1559):

> Mr. WALTER. * * * But is it not a fact that employers, under the law, must

retain their records for a period of three years?

Mr. HOBBS. That is my understanding. This is just warmed-over food from last year, and the House is going to eat it the same way they did before, because they know it is good and we are hungry. Anybody who has an honest claim under any of these civil statutes—which have no relation at all to the statutes of limitations in criminal cases—can certainly file his suit, if he thinks he has a case, within twelve months. Not only is that common sense, but it is justice, and is preeminently fair to every honest claimant.

In another context, the following statement of Mr. Bryson, a member of the Committee, is equally pertinent (93 Cong. Rec. 1501):

> This bill is applicable to every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages—actual, liquidated, or compensatory—pursuant to the act of August 30, 1935 (49 Stat. 1011); the act of June 30, 1936 (49 Stat. 2036, the Walsh-Healey Act); and the act of June 25, 1938 (52 Stat. 1060, the Fair Labor Standards Act). The bill requires that all actions predicated upon the foregoing acts for the foregoing reasons shall be brought within 1 year after the cause of action accrues but requires that all actions accrued upon the date of approval of this bill shall be brought within 6 months. This provision, I think, is constitutional, for all that is required in such cases is that a reasonable time be allowed in which to bring suit. See *Mills* v. *Scott* (99 U. S. 25); *Vance* v. *Vance* (108 U. S. 514); *Wilson* v. *Isminger*

(185 U. S. 55); *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.* (250 U. S. 190).

Since the Constitution does not require that the United States be given a reasonable time to bring suit, congressional concern over the constitutionality of the proposed limitations provision tends to show that it was directed solely to suits by employees.

It should be noted that our view of the intention of Congress respecting the limitations provisions does not render the inclusion of the Walsh-Healey Act meaningless. As in the 79th Congress, it was apparently again assumed that the Walsh-Healey Act, as well as the Fair Labor Standards Act, conferred a right of action upon employees. Thus, Mr. Allen, Chairman of the Rules Committee, in explaining the purpose of the bill at the outset of debate, stated that "In effect, this bill would outlaw claims for make-ready time in portal-to-portal suits. It would also establish restrictions on actions of employees to recover other forms of overtime pay to which they have no just claim. To this extent, this bill would repeal those sections of the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act which are inconsistent with its provisions." 93 Cong. Rec. 1435. The Walsh-Healey Act was similarly interpreted by Mr. Celler, who vigorously opposed a one-year period of limitation, during a colloquy with Mr. Vorys over whether the proposed federal period of limitation would completely supplant the longer state statues (93 Cong. Rec. 1495):

pay] have been made is not at all conclusive as to whether or not such claims have been made or hereafter will be made" (93 Cong. Rec. 2088). Similarly, Senator Cooper, also a member of the Subcommittee, stated that "even though as yet no suits have been filed under those acts [Walsh-Healey and Bacon-Davis], the contingent liability exists * * * and it seems to me that contracts entered into under those two acts present a contingent liability. *There is the opportunity for employees to sue* * * *," 93 Cong. Rec. 2130. [Emphasis supplied.] See also 93 Cong. Rec. 2098, 2123–2124.

Indeed, the opponents of the bill apparently subscribed to this view of the Walsh-Healey Act. Arguing against the inclusion of the Walsh-Healey and Bacon-Davis Acts in the bill, Senator McGrath stated that "no suits would be brought under either of these Acts for this type of compensation. It lies in the simple fact that in neither the Walsh-Healey Act nor the Bacon-Davis Act is any provision made for liquidated damages. So no employee would be well advised by counsel to bring a suit of this kind save under the Fair Labor Standards Act, and so none have been brought," 93 Cong. Rec. 2088.

In the ensuing colloquies between Senators McGrath and Donnell, the Committee's misconception of the liquidated damages provision of the Walsh-Healey Act was seemingly corrected. In answer to Senator McGrath, Mr. Donnell agreed "that there is no tremendous liability for the liquidated damages under the Walsh-Healey Act" but called attention to the fact that the Walsh-Healey Act contained a liquidated damages provision. 93 Cong. Rec. 2241. The following

exchange then occurred (93 Cong. Rec. 2241–2242):

> Mr. McGRATH. I should like to keep the record straight at this point. In the discussion I had with the Senator from Missouri a few days ago we were speaking about the fact that no portal-to-portal case, so-called, has yet been brought under either the Walsh-Healey Act or the Bacon-Davis Act. I made the remark that the reason for this was that no amount was allowed under those acts to the employee as liquidated damages. The Senator from Missouri questioned the accuracy of that statement and now reads a provision from the general statute to the effect that there is a liability running to the United States by virtue of a violation of the Walsh-Healey Act. We were not talking about liability to the United States; we were talking about what an employee could recover for himself in a suit brought against his employer. So I think, Mr. President, that I was accurate in my statement the other day, and I am still accurate, that there is no reason whatsoever why any employee would consider bringing or be well advised to bring a suit for portal-to-portal activities under any act save the Fair Labor Standards Act of 1938. I believe that probably answers the inquiry of the Senator from Missouri in respect to that point.
>
> Mr. DONNELL. I thank the Senator for his answer. I think the Senator will agree that the quotation I read is an accurate quotation from the Walsh-Healey Act.
>
> Mr. McGRATH. I agree it is a correct quotation, but I agree also that it does not concern itself with what we were speaking about the other day, namely, what rights

> an employee has as against his employer for what we call liquidated damages. * * *

In the light of this discussion, it became apparent that, whether intended or not, the language of subsection (b) (1) of Section 9 of the Senate bill might have some undefined collateral effects on suits by the United States. Arguing in favor of an amendment proposed by Senators McGrath and McCarran which would *inter alia* strike the Walsh-Healey and Bacon-Davis Acts from the bill (93 Cong. Rec. 2366), the former stated (93 Cong. Rec. 2254–2255):

> * * * With reference to limitations of action section 9 (b) (1) limits suits by employees against their employer to a period of two years. It assumes, however, that an employee suing his employer under this act can recover double damages in such an action, as is the case in suits under the Fair Labor Standards Act, where the employee can recover an additional amount as liquidated damages. The Walsh-Healey Act does not permit an employee to recover such an additional amount in a suit against his employer. Double recovery can be had by an employee only, if at all, when, after the employee has recovered his unpaid wages, the Government sues the employer and recovers under section 2 of the act for liquidated damages for breach of contract, and subsequently pays the money recovered over to the employee who was underpaid. If the phrase "an additional amount as liquidated damages" has any meaning, it applies to that situation. It seems hardly just to penalize the employee because the Government is dilatory in

> bringing action against the employer. This is particularly true since it applies only to those employees who brought their actions early. Moreover, it makes the Government's right to recover dependent on the inactivity of employees.

This statement appears to us ambiguous and inconclusive in that, although the primary emphasis is on employee suits, there is, possibly, the incorrect assumption that the Government might only maintain a suit in default of an earlier suit by the employee. On the other hand, the reference to limitations is limited to employee suits.

In opposition to this amendment, Senator Donnell replied (93 Cong. Rec. 2364):

> Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act. The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he is entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future, under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.
>
> * * * * * *

> Mr. President, suppose the Congress enacts the pending bill but does not include its references to the Walsh-Healey and Bacon-Davis Acts. Then a man who files suit under the Fair Labor Standards Act will find such suit cancelled and nullified by the action of Congress. What will he do then? If he is an employee working in a plant which makes any material for the benefit of the Government, and which comes under the Walsh-Healey Act, he will join with other employees in requesting—yes, demanding—of the Secretary of Labor that a suit be filed for his protection under the Walsh-Healey Act because he has lost his protection under the Fair Labor Standards Act.

Senator Donnell then pointed out that (93 Cong. Rec. 2364):

> to abandon the protection of the Walsh-Healey Act and the Bacon-Davis Act would be the part of absolute mistake, and would be the poorest sort of judgment. Why did the House of Representatives include it? I understand that some jurisdictional point was involved. I do not know the full details regarding it, but I undertake to say that, whether wittingly or unwittingly, they placed in the bill a wholesale protection for the Government of the United States which we would be foolish indeed to leave out of our bill.

The McGrath-McCarran amendment was subsequently defeated (93 Cong. Rec. 2367), and the bill passed in the form proposed by the Committee (93 Cong. Rec. 2375).

We think it is a fair summary of the Senate history of H. R. 2157 to say that the proponents

of the bill were principally concerned with the possible increased financial burden to industry and to the Government which might result if portal-to-portal claims under the Fair Labor Standards Act were barred, only to be then allowed in the guise of employee suits under the Walsh-Healey and the Bacon-Davis Acts. Likewise, the opponents of the bill joined issue only on the question whether a sufficient showing had been made which would necessitate barring employee suits under the Walsh-Healey and Bacon-Davis Acts to attain the basic purpose of barring portal-to-portal claims.

(iii) *Conference Committee.*—Following its passage by the Senate in amended form, H. R. 2157 was referred to a Committee of Conference. The misconception of the Senate Judiciary Committee concerning the liquidated damages provisions of the Walsh-Healey Act was apparently discovered by the Conference Committee, which corrected that misconception by changing the bill in three respects: First, the parenthetical statement in Section 1 of the Senate bill (see *supra*, p. ~~109~~) was changed to the version enacted into law. The Committee thus recognized that the Walsh-Healey Act did not allow recovery of additional sums as liquidated damages, and manifested its understanding that the problem confronting Congress had reference solely to the liquidated damages provision of the Fair Labor Standards Act. In conformance with this change in the Statement of Findings in Section 1, the Committee also eliminated from the Senate bill the language in Sections 9 (b) (1) and 10 (2) which spoke of liability "for an additional amount

as liquidated damages under the Walsh-Healey Act" (see *supra*, p. 109). In making the change, the Committee, adopting the 2-year limitation of the Senate bill, combined the limitations provisions relating to all three acts and simplified the language. In so doing, the present Section 6 was created.

The Conference report contains no intimation that the present Section 6 was intended to be applicable to suits by the United States under either of the Acts. To the contrary, the thrust of the report of this Committee is on the manner in which the varying state statutes of limitations—which, as we have pointed out, are inapplicable to the United States—would be superseded by the new uniform federal period of limitation. H. Rep. 326, 80th Cong., 1st Sess., pp. 13–14. Similarily, Mr. Gwynne, in explaining the Conference report, which was agreed to without debate (93 Cong. Rec. 4372, 4391), stated that (93 Cong. Rec. 4388):

> * * * Under this bill all causes of action arising in the future, and by that I mean after the effective date of the act, must be brought within 2 years after the cause of action accrues. As to causes of action accruing prior to the effective date of the act, action must be brought either within 2 years or within the applicable State statute, whichever is shorter. That provision became necessary when the statute of limitations was raised from 1 year to 2 years in order to protect certain States that now have a 1-year statute of limitations. Any cause of action that has accrued prior to the effective date of this act may be brought within 120 days after the act be-

> comes effective, subject, however, to the provision that any cause of action barred by any State statute, whatever the length of it may be, is not revived. That action remains barred.

Further, although the Conference report is silent with respect to the applicability of Section 6 to the United States, it elsewhere expressly points out the Committee's understanding that employers will be relieved from criminal actions, as well as civil liability, under Sections 2, 9 and 10. H. Rep. 326, *supra*, pp. 9, 11, 16. The changes made by the Conference Committee and the explanations offered by the Committee of those changes are persuasive evidence that the Walsh-Healey Act was included in Section 6 of the Portal-to-Portal Act not to curtail enforcement actions brought by the Government but to prevent possible flanking attacks by employee suits under that statute which would nullify the effect of the amendments to the Fair Labor Standards Act.[9]

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[9] We think it pertinent to observe that the position for which the Government here contends was expressly brought to the attention of Congress shortly after the enactment of the Portal-to-Portal Act. The House Committee on Education and Labor was advised by Mr. Tyson, Solicitor of the Department of Labor, that Section 6 of the Act did not apply to criminal prosecutions and injunction proceedings brought by the Government under the Fair Labor Standards Act, and did not apply to actions by the Government to recover liquidated damages under the Walsh-Healey Act. See Hearings Before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, 80th Cong., 1st Session, on proposed amendments of the Fair Labor Standards Act of 1938, Vol. 4, pp. 2711-2723, Dec. 17, 1947. Although thus informed, Congress apparently took no action in this connection.

U. S. GOVERNMENT PRINTING OFFICE: 1953